

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

LAZ Parking LTD, LLC	:	
-vs-	:	
Commonwealth Edison Company	:	
	:	12-0324
Complaint pursuant to Sections 9-250	:	
and 10-0108 of the Illinois Public Utilities	:	
Act and Section 200.170 of the	:	
Rules of Practice of the Illinois	:	
Commerce Commission.	:	

PROPOSED ORDER

August 11, 2016

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By the Commission:

I. PROCEDURAL HISTORY

On May 2, 2012, LAZ Parking LTD, LLC (“LAZ” or “Complainant”) filed a Formal Complaint with the Illinois Commerce Commission (“Commission” or “ICC”) containing five counts against Commonwealth Edison Company (“ComEd” or “Respondent”) to contest charges to LAZ for alleged unbilled delivery services.

Both the Complainant and the Respondent were represented by counsel. The Administrative Law Judge (“ALJ”) conducted a number of pre-hearing conferences and the parties engaged in extensive motion practice, including motions to dismiss and for summary judgment by ComEd and five motions to strike by LAZ, as detailed below.

On November 13, 2012, after the parties exchanged discovery requests and responses, LAZ filed a Motion to Deem Certain Facts Admitted pursuant to Requests for Admission and Responses Thereto. ComEd filed its Response in Opposition on December 17, 2012, and on January 11, 2013, LAZ filed its Reply in Support of its Motion. After this motion was fully briefed, on June 10, 2013 the ALJ held a pre-hearing conference and the parties requested oral argument on the Motion to Deem Certain Facts Admitted. Also on June 10, 2013, ComEd filed a Motion to Dismiss the Complaint on the Merits.

ALJ Bonita Benn heard oral argument on the Motion to Deem Certain Facts Admitted on June 28, 2013. ComEd filed late-filed exhibits consisting of Illinois statutes, Illinois Administrative Code sections, and case law discussed at oral argument on July 11, 2013 and the Complainant filed its Response on July 26, 2013. On December 4, 2013 the Complainant moved to voluntarily dismiss Counts 1, 3, and 4 from the Complaint.

On February 13, 2014, the ALJ issued a Notice of Ruling deeming Certain Facts admitted. The next day LAZ filed a Motion to Strike ComEd’s Motion to Dismiss the

Complaint on the Merits. On February 27, 2014, ComEd filed a Motion to Reconsider the ALJ Ruling of February 13, 2014. LAZ filed its Response to ComEd's Motion to Reconsider on March 27, 2014, and ComEd filed its Reply in Support of its Motion to Reconsider on April 17, 2014. On March 9, 2015, the ALJ issued a Ruling denying ComEd's Motion to Reconsider the ALJ Ruling of February 13, 2014.

ComEd filed an Amended Motion to Dismiss on April 30, 2015. On May 14, 2015, LAZ filed a Motion to Clarify, to Strike and to Continue Generally the Hearing on ComEd's Amended Motion to Dismiss.

A status hearing was held on May 29, 2015 at which ALJ Hilliard noted that he had been substituted for ALJ Benn in this matter. On June 30, 2015, ComEd filed a Motion for Summary Judgment. On July 13, 2015, Complainant LAZ filed a Motion to Strike Portions of ComEd's Motion for Summary Judgment and Supporting Affidavits, and to Strike the Schedule for Same. ComEd filed its Response to that Motion on July 24, 2015, and LAZ filed its Reply on July 31, 2015. At the next status hearing on August 5, 2015, ALJ Hilliard denied LAZ's July 13 Motion to Strike.

On September 25, 2015, LAZ filed its Response to ComEd's Motion for Summary Judgment, and on October 19, 2015, ComEd filed its Reply. LAZ then filed a Motion to Strike Portions of ComEd's Reply to LAZ's Response to ComEd's Motion for Summary Judgment on October 23, 2015, and ComEd filed a Response to that Motion on November 6, 2015. On November 9, 2015, the ALJ issued a ruling denying ComEd's Motion for Summary Judgment.

At the November 13, 2015 status hearing, an evidentiary hearing date of January 26, 2016 was set. On January 6, 2016, due to substitution of counsel for ComEd, the evidentiary hearing date was continued to March 15, 2016.

The parties each submitted Direct Testimony on February 18, 2016, Rebuttal Testimony on March 7, 2016, and Surrebuttal Testimony on March 11, 2016. ComEd presented pre-filed testimony of the following current and former employees: Thomas R. Rumsey, Retired Meter Mechanic; Derrick E. Moore, Senior Energy Technician; Marisa Spitz, Retired Billing Clerk; and Trishaun Jamison, Senior Business Analyst, Revenue Management. LAZ presented pre-filed panel testimony of Antonio P. DiPaolo, Senior Vice President for the Midwest Region of LAZ, and Stuart Vieth, General Manager of LAZ. LAZ also presented pre-filed testimony of Richard B. Bernhardt, founder and president of the firm of John-Winston Engineers & Consultants, Inc. in Allenhurst, New Jersey.

Pursuant to notice given as required by law and by the rules and regulations of the Commission, the evidentiary hearing in this proceeding was held at the Commission's offices in Chicago, Illinois on March 15, 2016. At the conclusion of the evidentiary hearing the record was marked "Heard and Taken."

The parties filed and served Initial Briefs on April 21, 2016, Reply Briefs on May 13, 2016 and Draft Position Statements on May 20, 2016. On May 26, 2016, ComEd filed a Motion to Strike Portions of LAZ's Position Statement. On June 2, 2016, LAZ filed its Response to ComEd's Motion to Strike Portions of LAZ's Position Statement. On June 8, 2016, ComEd filed a Reply in Support of its Motion to Strike Portions of LAZ's Position Statement.

II. BACKGROUND

Utility electric meters measure the amount of electrical current that is delivered to customers. Only a small amount of current can pass through typical watt-hour meters used to measure energy consumption without damaging them. These meters are suitable for use in homes and small businesses. Measuring the usage of a high volume customer with a similar meter is not feasible because the large amount of current that passes through the meter would damage it. Utilities use current transformers (“CTs”) to “step down” or reduce the amount of current that passes through the meter to a small fixed percentage of the original amount to prevent damage to the meter. ComEd Ex. 1.0 at 7.

ComEd utilizes between one and three CTs (one CT for each of the meter’s phases or hot wires), in conjunction with a transformer rated meter. *Id.* The electrical current flows through the CTs and is reduced to a level the meter can handle. *Id.* The meter and associated equipment in use at LAZ’s facility at 25 N. Michigan Ave. in Chicago, IL (“Laz Facility”) in this case was Meter No. 141362866 (“LAZ Meter”) and its three associated current transformers (“LAZ CTs”). *Id.* at 2. The meter by itself is not capable of measuring the customer’s consumption. The meter plus the current transformers function as a measuring unit, or a metering installation. *Id.* at 7.

When ComEd installs a meter, the installer must provide ComEd’s Customer Information & Marketing System (“CIMS”) with the information about the CTs, including their model type and size, to determine the “billing multiplier.” The billing multiplier is a number or constant by which the billing system must multiply the meter data in order to properly record and bill for the customer’s actual usage. ComEd Ex. 1.0 at 7-8. In the normal course of business, because the electrical current flowing through the meter is greatly reduced, ComEd’s billing system, using the information about the meter and transformers obtained from the service location, input at the time the meter is installed, multiplies the meter reading to properly measure energy usage.

At the time of installation, a label is placed on installed meter/CT locations showing the correct meter constant and other information, pursuant to Section 410.120(b) of the Commission’s Rules. 83 Ill. Adm. Code 410.120(b). If this information is not input into the billing system from the meter installation, the correct energy usage will not be accurately measured and the customer’s bills will be incorrect.

The model type and size of the LAZ meter and its CTs indicate that for every 3,000 amps that flowed through the LAZ CTs, only 5 amps flowed to and registered on the LAZ Meter. If the information from the LAZ metering system had been incorporated in the billing system, ComEd would have multiplied the actual usage registered on the LAZ Meter by 600 (3,000 divided by 5) to generate a bill for the correct usage. ComEd Ex. 1.0 at 12-13. This ratio would be expressed as a constant of 600 kilowatt hours (“kWh”). *Id.* at 13. The constant also has a second component for the commercial demand charge of 0.18 kilowatts (“kW”). *Id.* This 0.18 kW figure is determined pursuant to a formula that uses the 600 kWh figure. *Id.*; ComEd Ex. 3.0 at 6; ComEd Ex. 3.05.

When ComEd installed a meter with CTs at the LAZ location in August 2000, ComEd input the correct constant from the metering location to CIMS. For seven years, LAZ’s bills correctly reflected LAZ’s actual usage. ComEd Ex. 1.0 at 8, 14-15, ComEd

Ex. 3.0 at 7; ComEd Ex. 3.04. Then on December 14, 2007, ComEd replaced that meter with the LAZ Meter and CTs at issue in this case. ComEd Ex. 1.0 at 14. The billing multipliers or constants for the new metering installation were not communicated by the installer from the meter/CT installation to the CIMS system. As a consequence, the CIMS system issued bills without multiplying the current usage by 600. The system computed bills using the default value of one (no multiplication). ComEd's billing system used this incorrect value until May 3, 2010. As a result, LAZ's bills during that period reflected far less usage than what occurred. ComEd Ex. 3.0 at 7; ComEd Ex. 3.04. LAZ's bills dropped substantially from its pre-2008 levels. See ComEd Ex. 3.04 (showing decline).

ComEd has no record of a post installation inspection occurring within 90 days of the installation or at any other time prior to April 6, 2010. On that date, ComEd dispatched an employee, Derrick Moore ("Mr. Moore"), to the LAZ metering installation for the purpose of obtaining information regarding the equipment in use by LAZ. Specifically, ComEd Exhibit 2.03, entitled "Individual Order Completion Data Report" under the heading Issuance Comments, states that Mr. Moore was sent to the LAZ site because someone had discovered that the LAZ "meter is missing CT information." This document on page 2 of 4 indicates that Mr. Moore conducted a post installation inspection two and a half years after the meter and attached CTs were put in service. This inspection led directly to the discovery of the billing error at the LAZ meter location.

As reflected in ComEd Exhibits 2.0, 2.01, 2.01 and 2.03, Mr. Moore acquired CT information from the LAZ Meter installation and updated CIMS. Mr. Moore stated that among other things, he recorded the size (3,000) and ratio (600) of the CTs in use with the LAZ Meter. *Id.* at 3. Once he completed the information collection, he entered everything into his Mobile Dispatch Terminal ("MDT"), a laptop computer. This information was then transferred to a Field & Meter Services ("F&MS") clerk who input the data into CIMS. *Id.*; ComEd Init. Br. at 4-5.

CIMS issues a weekly Meter Constant Discrepancy Report ("Constant Report"). The Constant Report alerts ComEd if there are any discrepancies between the equipment in use by ComEd's customers and the constant information entered into CIMS. ComEd Ex. 3.0 at 4. The April 23, 2010 Constant Report, generated after Mr. Moore's LAZ Facility visit and after the F&MS clerk updated CIMS, indicated for the first time that there was an issue with the constant entered into CIMS for the LAZ Meter. *Id.*; ComEd Ex. 3.03; Tr. at 408. The Constant Report indicated that there was a discrepancy between the constant CIMS should have been using (600) and the constant actually in use (1). ComEd Ex. 3.0 at 5. Ms. Spitz, a billing clerk for ComEd, testified that the LAZ meter had not appeared on any prior constant reports.

After seeing the April 23, 2010 Constant Report, Ms. Spitz, obtained and reviewed a CIMS Meter Reading History for the LAZ meter. ComEd Ex. 3.0 at 5; ComEd Ex. 3.04. This document contains historical billing information for the LAZ Meter from June 5, 2007 through May 3, 2010. *Id.* She verified that erroneous billing had occurred by sending a technician to conduct another on-site inspection to verify the type of "meter and the size and type of the LAZ meter and current transformers associated with that particular meter." On the basis of that second inspection, the correct data was entered into CIMS. ComEd Ex 3.02 page 2.

Ms. Spitz stated that she then cancelled the incorrect bills for delivery service provided in the June 3, 2008 to May 3, 2010 time period. *Id.* at 6. She then corrected the constant in CIMS using the data provided by Mr. Moore after his April 6, 2010 inspection of the LAZ meter. *Id.*

ComEd issued re-bills for the full amount of the delivery service provided in the same time period, keyed to the meter read date of May 5, 2010. *Id.* at 6-7. ComEd then automatically issued a credit in the amount that LAZ had already paid for service from June 3, 2008 through May 5, 2010. *Id.* at 7; ComEd Ex. 4.0 at 5-6.

The Meter Reading History for the LAZ meter indicated that the under-billing went back to the date ComEd exchanged the meter on December 14, 2007. ComEd Ex. 3.0 at 7. ComEd, however, is only permitted to issue re-bills for billing errors for two years from to the date it provided the delivery service. 83 Ill. Adm. Code 280.100. Therefore, ComEd stated that it limited the re-billing to the two-year period from June 3, 2008 to May 3, 2010. ComEd Ex. 3.0 at 7.

Subsequent to May 3, 2010, ComEd rebilled LAZ \$225,484.52 for delivery services for the two year period from June 2008 to May 3, 2010. ComEd Ex. 4.0 at 4; ComEd Ex. 4.03 at CCLP 0000009-11; ComEd Ex. 4.04. In that time frame, using the incorrect constant, ComEd had billed LAZ – and LAZ had correspondingly paid \$44,541.37 for delivery services. ComEd subsequently billed LAZ for \$180,943.15 in unbilled delivery service charges (\$225,484.52 total value minus \$44,541.37 previously billed). ComEd Ex. 4.0 at 4. LAZ paid this amount.

On September 20, 2010, LAZ received a Disconnect Notice (“Disconnection Notice”) from ComEd that claimed that LAZ owed ComEd \$36,625.07. According to LAZ, the notice contained no explanation of what the charge was for. On or about October 4, 2010, LAZ made a payment of \$36,625.07 to ComEd to avoid ComEd's threatened disconnection. LAZ contends that this bill was for unbilled service prior to June 3, 2008 barred by regulations. This amount was included in the total amount referenced in discovery by LAZ that was the subject of February 13, 2014 ALJ Ruling deeming certain facts admitted. ComEd contends the \$36,625.07 demanded in the September 20, 2010 Disconnection Notice was related to unpaid service provided by ComEd between June 3, 2010 and September 1, 2010. ComEd Ex. 4.0 at 2.

Since ComEd obtained the corrected CT billing constant from the meter installation and incorporated it in its billing system, LAZ's bills have returned to pre-2008 levels and have accurately reflected LAZ's electricity usage. See, e.g., LAZ Ex. 1.0 at 5-6; ComEd Ex. 1.01, Affidavit of Thomas R. Rumsey, ¶¶ 12, 13. Since Mr. Moore's April 6, 2010 inspection of the LAZ meter installation, ComEd has not removed or adjusted the LAZ Meter or LAZ CTs. ComEd Ex. 1.0 at 14.

III. REGULATORY FRAMEWORK

Part 410 of the Illinois Administrative Code, 83 Ill. Adm. Code 410 *et seq.* (“Part 410”), provides standards of service for electric utilities and alternative retail electric suppliers.

Section 410.10 (83 Ill. Adm. Code 410.10) defines:

“Billing multiplier” as the number by which a meter register reading is multiplied to obtain actual usage data. The billing multiplier shall include the transformer multiplier and meter multiplier, if applicable.

“Metering Service” as the performance of functions related to the provision, installation, testing, maintenance, repair and reading of electric meters used for billing of retail customers and maintaining meter usage data as well as the maintenance and management of meter information and meter data with respect to those meters; and

Section 410.155 (83 Ill. Adm. Code 410.155) states:

Installation Inspections:

Within 90 days after installation or exchange of any meter with associated instrument transformers and/or phase-shifting transformers, a post-installation inspection shall be made under load to determine if the meter is accurately measuring customer energy consumption. At a new or re-wired metering location, where the installation includes potential transformers, the inspection shall be performed by someone other than the original installer.

Section 410.200 (83 Ill. Adm. Code 410.200) states:

Corrections and Adjustments for Meter Error

a) Whenever any test made by any entity or by the Commission shows a meter to have an average error of more than 2%, a correction of the metering data shall be determined by the entity providing metering service and that correction shall be conveyed within 3 business days to the customer and to other entities involved in billing the customer.

b) When a meter is found to have an average error of more than 2%, the entity providing metering service shall determine the metering data correction using the actual percentage of error as determined by the test, not the difference between the allowable error and the error found as a result of a test.

c) If the meter is found to run faster than allowable, the entity providing metering service shall determine the correction to the metering data for that meter. In determining the correction it shall be presumed, unless demonstrated otherwise, that the inaccuracy has existed for a period of 2 years. This period of presumed inaccuracy shall not exceed

the time for which records of the current customer's usage exist.

d) If the meter is found to be slower than allowable, the entity providing metering service shall determine the correction to the metering data for that meter. In determining the correction, it shall be presumed, unless demonstrated otherwise, that the inaccuracy has existed for a period of 1 year prior to the test for small commercial and residential customers and 2 years prior to the test for all other customers.

e) In the case of a non-registering meter that has been read during the period of non-registration, the entity providing metering service shall not determine a correction to metering data for estimated consumption extending over more than twice the regular interval between readings.

f) No corrections to metering data for meter error shall extend beyond the in-service date of the meter discovered to be in error, nor shall any correction be required to extend beyond the date upon which the current customer first occupied the premises at which the error is discovered.

g) Whenever an entity or the Commission's representative finds that a service watt-hour meter, while in service, exhibits creep, the entity shall make an estimate of the registration caused by the creep during the period as specified under subsection (c) and shall make a corresponding correction in the metering data.

h) Billing adjustments

1) For electric utilities. Any correction to metering data for over-registration shall be accompanied by an adjustment to customer billing by any electric utility that rendered service that is affected during the period of adjustment. Corrections made to metering data for under-registration may be accompanied by an adjustment to a customer's billing. However, if an electric utility is providing metering service, in no case shall an adjustment to a customer's billing be made for under-registration if all testing and accuracy requirements of this Part have not been met.

2) For entities other than electric utilities. Any correction to metering data made by any entity other than an electric utility and all records relating to the adjustment of the customer's billing or charges shall be retained for at least 2 years.

i) Provisions of this section do not apply to situations in which the customer's wires, meters or other service

equipment have been tampered with and the customer enjoyed the benefit of the tampering.

The current version of Part 280 of the Illinois Administrative Code, 83 Ill. Adm. Code 280 *et seq.* ("Part 280"), contains the regulations for utility service, deposits, billing, payments, refunds and disconnection of service. Section 280.100 provides in part:

Unbilled Service

a) Intent: This Section provides for the billing and payment of previously unbilled service caused by errors in measuring or calculating a customer's bills.

b) Time Limits:

1) Bills for any utility service, including previously unbilled service, supplied to a residential customer shall be issued to the customer within 12 months after the provision of that service to the customer.

2) Bills for any utility service, including previously unbilled service, supplied to a non-residential customer shall be issued to the customer within 24 months after the provision of that service to the customer.

This section was amended in 2014. The prior version of Section 280.100 was titled "Unbilled Service" and provided in relevant part:

a) A utility may render a bill for services or commodities provided to:

1) A residential customer only if such bill is presented within one year from the date the services or commodities were supplied, or

2) A non-residential customer only if such bill is presented within two years from the date the services or commodities were supplied.

b) No customer shall be liable for unbilled or mis-billed service after expiration of the applicable period except in those instances to which 83 Ill. Adm. Code 500.240(a), 83 Ill. Adm. Code 410.260(c), or the following subsections of this Section apply.

83 Ill. Adm. Code 280.100.

The terms test and inspection are not defined in the Part 280 or Part 410.

IV. LAZ'S POSITION

A. Application of Part 410 Generally, and Section 410.200(h) in Particular.

The meter accuracy and testing requirements of Part 410 are not optional for electric utilities. They are mandatory. ComEd argues that Part 410, and in particular the sanctions prescribed by Section 410.200(h) only apply if there has already been a test of the customer's meter that shows it to have an error of more than plus or minus 2.0%. ComEd Init. Brief 13. LAZ contends that ComEd's position is contrary to the sections of Part 410 that apply to transformer meters.

LAZ states that it is interesting to compare the exacting precision with which ComEd attempts to parse the supposed distinction between "inspection" and "test" in Section 410.155, (e.g., ComEd Init. Brief at 17-19) with its aggressive inattention to the term "all testing and accuracy requirements of this Part [*i.e.*, Part 410]" as used in Section 410.200(h)(1).

From an *ex ante* viewpoint, nothing in either Section 410.200 or any other term, section or provision of Part 410 makes its application contingent on the electric utility's having previously performed a test of the customer's meter that showed an error outside the 98%-102% range permitted by Section 410.150. Quite the contrary, Section 410.120(c) would prohibit ComEd from installing such a meter. Under ComEd's logic, it would be subject to a sanction only if, after testing a meter and finding that it did not meet the accuracy standards, it installed it anyway.

LAZ contends that ComEd's position is also illogical from an *ex post* viewpoint. Section 410.200(h)(1) is clear that its sanction of prohibiting any bill adjustment applies if any testing and accuracy requirement of Part 410 has not been met. The testing and accuracy requirements of Part 410 include both pre-installation testing, Section 410.160, and post-installation testing, Section 410.155. Under ComEd's reading of Part 410 in general, and Section 410.200(h)(1) in particular, if ComEd fails to do any of the testing required by Part 410, it can't be sanctioned under Section 410.200(h)(1) because there was no test that showed the meter to be outside the 98%-102% accuracy tolerance. LAZ asserts that under ComEd's interpretation the sanctions for its failure to test a meter under Part 410 do not apply if it has failed to test the meter.

There is nothing unclear or ambiguous in Section 410.200(h)(1). All testing and accuracy requirements means all of them, including post-installation testing and inspection under Section 410.155. The meaning of this section, and the sanction that Section 410.200(h)(1) reflect, on their face, the basic purpose of these accuracy and testing requirements, which is to prevent exactly the type of problem that arose in this case due to ComEd's failure to perform a post-installation test or inspection.

B. Meter Accuracy Inspection vs. Meter Accuracy Test

One of the disputed issues in this case is whether a meter accuracy "inspection" is different from a meter accuracy "test." Neither term is defined in Part 410. The only evidence that ComEd offers for its definition is the testimony of its witness Mr. Rumsey ("Rumsey"). Rumsey claimed that the ICC and ComEd agreed at some indeterminate point in the past that commercial meters could be sample tested (Tr. 350), but ComEd

provides not one iota of support for this assertion. In any event, Section 410.180(a), discussed below, would contravene any such deal.

Just as ComEd labors to separate the “meter” from the customer’s metering installation as an integrated whole, it labors even more strenuously to characterize inspection as a ComEd technician’s confirmation that the CTs are properly connected and that power is flowing in the right direction. Tr. at 355-356; 377. ComEd ignores the express context in which the term “inspection” appears in Section 410.155:

...a post-installation inspection shall be made under load to determine if the meter is accurately measuring customer energy consumption.

83 Ill. Adm. Code 410.155.

Section 410.155 does not say that the meter shall be “inspected” solely for the purpose of making sure instrument transformers are correctly connected and that the power is flowing forward, not backward. (e.g., Tr. at 377). That definition of “inspection” is purely a ComEd invention. Rather, the purpose of the post-installation “inspection” is to determine whether the meter is accurately measuring the customer’s energy consumption, and whether it is doing so “under load.” LAZ witness Bernhardt’s un rebutted testimony is that ComEd’s inspection of the CT connections and the power flow direction are entirely inadequate to determine whether the meter is accurately measuring the customer’s energy consumption. Furthermore, LAZ witness Bernhardt’s testimony makes clear that “under load” at the customer’s service location includes at minimum a test of the customer’s meter under the customer’s actual load in series with a portable standard; this is the only way to be sure that the testing is complete. Tr. at 278-279; 281; 313.

LAZ contends that ComEd’s defines “inspection” so narrowly as to defeat the entire purpose of the Commission’s meter accuracy and testing regime by making any post-installation “inspection” a useless exercise that can tell the utility nothing about whether the customer’s meter is accurately recording energy consumption. ComEd witness Rumsey describes a test regime in which the meter is entirely isolated, and tested under a phantom load in the portable standard without reference to any billing multipliers that must be applied if the customer’s metering installation (including instrument transformers) is to be considered as a whole. *Id.* ComEd’s version of a post-installation test or inspection would not have shown the error at issue in this case.

Rumsey also never explains how he could determine that a meter was accurately measuring energy consumption without doing what he would call a test. LAZ Ex. 3.0 at 7.

C. ComEd’s Meter Inspection Regime Is So Deeply Flawed as to Be Useless

LAZ agrees that the meter testing procedure prescribed by ComEd’s witness would not have shown the error at issue in this case, only because ComEd’s testing and accuracy procedures are deeply flawed. LAZ Ex. 3.0 at 4. The accuracy testing or accuracy inspection recommended by LAZ witness Bernhardt can be done with portable testing equipment that is commonly available. The error here is a direct result of ComEd’s

business decision not to employ such equipment. LAZ Ex. 3.0 at 5; LAZ Ex. 2.1. In fact, ComEd's testing and accuracy procedures prevent ComEd from discovering problems with a customer's metering installation. LAZ Ex. 3.0 at 6.

LAZ argues that across the electric utility industry, portable standards are commonly used to prove that the meter and all its related equipment are working correctly. Good utility practice would be to properly coordinate data from the metering installation with the utility's billing system. Tr. at 245. The record in this case shows that ComEd does not do that. It just checks to see if the CT wiring is correct and whether power is flowing forward, not backward. ComEd relies on batch testing and the meter manufacturer's representation that the meter is accurate. ComEd Ex. 1.0 at 9. For ComEd, any post-installation inspection is a waste of time. ComEd Ex. 1.0 at 9.

To the contrary, LAZ witness Bernhardt testified that it is impossible to achieve the goal of Section 410.155 without performing what Mr. Rumsey would call a test of the meter. Tr. 325. Mr. Rumsey's "inspection" procedure undermines the entire goal of meter testing under load, which is to ensure that the metering installation, functioning as an integrated whole, will yield an accurate bill to the customer. LAZ Ex. 2.0 at 16.

LAZ contends that batch testing of commercial meters intended for use in transformer-rated installations with large customers is neither adequate nor proper. Tr. 315. Section 410.180(a) provides that batch testing is to be used "to sample test non-demand, self-contained single phase or three-wire network meters." The LAZ Meter is a transformer-rated meter, not a self-contained meter.

D. LAZ is Not Engaged in Rulemaking

LAZ contends that contrary to ComEd's assertions, none of the testing and accuracy measures recommended by LAZ witness Bernhardt amount to rulemaking, or even remotely approach it. LAZ has proposed no changes to any of the regulations on meter testing and accuracy. Indeed, it is difficult to believe that ComEd is arguing that LAZ is engaged in rulemaking when it has allowed Rumsey, its Meter Mechanic Special, to define for ComEd and all of its larger customers what is meant by a post-installation inspection intended to ensure that transformer-rated meters are accurately measuring customer usage, and to view metering as an end in itself unrelated to billing. If LAZ's proposal amounts to rulemaking, then ComEd's pronouncements on what the Sections in Part 410 mean are no less so. ComEd's procedures render Section 410.155 meaningless, because any additional meter accuracy protections intended for large customers with transformer-rated metering installations amount to virtually nothing.

E. Meter Error vs. Billing Error

LAZ asserts that ComEd's judicial admission that the LAZ meter was programmed with the wrong constant is, by itself, sufficient grounds to establish that, even in the teeth of ComEd's effort to distinguish "meter errors" from "billing errors," a meter error occurred in this case.

ComEd's claim that this case involves only a "billing error" rather than a "meter error" is wrong and, ultimately, irrelevant. As LAZ witness Bernhardt made clear, ComEd's claim that there is no connection between billing and meter accuracy is

preposterous. LAZ Ex. 3.0 at 13. The fundamental purpose of all utility metering is to bill the customer accurately and correctly.

ComEd bases its claim on its characterization of where billing multipliers “reside.” But the record in this case shows that ComEd itself doesn’t even know where it stores these numbers. ComEd has no one place where billing multipliers are stored: these factors, essential for accurately billing customers for usage could be in CIMS, or they could be in ComEd’s mobile data or dispatch terminal, and its location could depend on who is looking for the number. Tr. at 370-371; or the billing multipliers could even migrate in some unexplained way from the database to which the meter technician has access. Tr. at 387.

As LAZ witness Bernhardt made clear, the question of whether a constant or billing multiplier “resides” in the meter or “resides” in the billing system is irrelevant because regardless of where ComEd ultimately puts it (or finds it), it does not alter the fact that the number in question is needed to determine the actual usage of the meter under test. LAZ Ex. 2.0 at 6,17; LAZ Ex. 3.0 at 13-14. Not only has ComEd never rebutted Mr. Bernhardt’s position, ComEd witness Rumsey even agrees with it. ComEd Ex. 1.0 at 7. Mr. Bernhardt explained that the CT ratio is one of the billing multipliers need to obtain actual usage. *Id.*

LAZ argues that ComEd witness Spitz’s testimony inadvertently discloses the baselessness of ComEd’s supposed distinction between “billing error” and “meter error”: Ms. Spitz testified that the meter discrepancy report from which ComEd first discovered that there might be a problem when the LAZ meter showed differences between the “constant CIMS would expect to use” and the “constant actually in use.” ComEd Ex. 3.0 at 4. Obviously, the constant that “CIMS would expect to use” has to come from somewhere, and that somewhere can be no place other than the customer’s metering installation. Using ComEd’s own logic, the “residence address” of the correct billing multipliers for a particular meter, is in the actual metering installation, not CIMS.

LAZ urges the Commission to take judicial notice of ComEd’s pleadings in a similar docket, Amcor Flexibles, Inc. v Commonwealth Edison Company, Docket No. 11-0033 (“Amcor”). (That docket concerns scaling factors that were programmed into the virtual disk in a solid state meter, but there as well ComEd takes the position that the meter’s incorrect scaling factor is a “billing error” and not a “meter error.” (See, e.g., Respondent’s [i.e., ComEd’s] October 19, 2012 Response in Opposition to Complainant’s Motion for Judgment and in Support of Cross-Motion for Judgment in Favor of the Respondent). ComEd has taken the same position in the pending appeal of that case. See, e.g., Brief of Respondent-Appellee Commonwealth Edison Company, at 31-41, in Amcor Flexibles v. Illinois Commerce Commission and Commonwealth Edison Company, Ill. App. Court (1st Dist.) Case No. 1-15-2985. Apparently in ComEd’s world there are only billing errors. Meter errors never occur. The reason is clear: given the deficiencies in ComEd’s compliance with Part 410, to avoid the sanction of Section 410.200(h)(1) every error must be a billing error.

F. Meter vs. Metering Installation

LAZ asserts that ComEd’s attempt to isolate the meter from the rest of the customer’s metering installation is just a tactic aimed at showing that, because the CTs

are not physically parts of the meter, no post-installation inspection or test of the meter would have revealed the error at issue in this case.

ComEd's own tariffs give the lie to this argument because there ComEd uses the term "metering installation" over 150 times. e.g., Ill. C.C. No. 10, 7th Rev. Sheet No 22; 5th Rev. Sheet No. 32; 9th Rev. Sheet No. 40; 2nd Rev. Sheet No. 41; and *passim*.

LAZ witness Bernhardt made clear that a test of a meter has to include the meter plus its related auxiliary equipment, such as CTs. Tr. at 241-242. CTs are integral to the meter itself and to the measurement of the customer's actual energy consumption. Tr. at 244-245; 265; LAZ Ex. 3.0 at 9. LAZ witness Bernhardt made it clear that the intent of Section 410.155 is to include all of the devices auxiliary to the meter, such as CTs, as part of any test or inspection, because all of that equipment must be integrated with the meter in order to measure the customer's energy consumption. Tr. at 241-242. This type of meter depends on auxiliary equipment, like CTs, to properly measure the customer's usage. Tr. at 244.

LAZ witness Bernhardt made clear that it is not sufficient just to make sure that the CTs are installed correctly; the utility's field technician must make sure that whatever billing multipliers are derived from the metering installation are correct and are appropriately relayed to the utility's billing department, otherwise, the utility cannot have accurate billing. LAZ Ex. 2.0 at 6; LAZ Ex. 3.0 at 9; Tr. at 244-245. ComEd's refusal to recognize the CTs as an integral part of the customer's metering installation to be tested or inspected for accuracy along with the meter leads directly to a failure by ComEd to bill accurately. Tr. at 336.

G. A Proper Post-Installation Test or Inspection of the LAZ meter in Series Would Have Immediately Shown the Problem at Issue in this Case

LAZ asserts that Rumsey agreed that a field inspection, even the watered-down version of an inspection offered by ComEd, would have disclosed the problem at issue in this case. Tr. at 368.

LAZ witness Bernhardt made clear that several tests are needed to ensure that a customer's metering installation is accurately measuring energy usage. Tr. at 256. ComEd, according Rumsey, not only limits itself to just one type of test, the one test it claims to do only tests the meter in isolation from the customer's load. Tr. at 259. Because of this, any portable standard used in a ComEd test will never measure whether the customer meter is accurately registering the actual, full load of any customer whose metering installation employs CTs. Tr. at 264, 265. Furthermore, the additional tests that LAZ witness Bernhardt recommends would require only a few additional minutes. Tr. at 266-267.

As shown in LAZ Exhibit 3.1, the meter under test would be connected in series with a portable standard. LAZ Ex. 2.0 at 14. When the meter under test is in series with the portable standard, the utility technician would still have to apply all the same billing multipliers to get the usage from the meter under test and compare it to the results shown by the portable standard. LAZ Ex. 3.0 at 7.

LAZ argues the evidence also shows that even if ComEd's cursory post-installation inspection were done, the CT ratio would have been visually confirmed. According to ComEd, there is no way to know what size CT will be used at any particular customer service location. ComEd Amended Motion to Dismiss (April 30, 2015) at 6. CT specifics are confirmed on meter installation and allegedly entered into ComEd's system. *Id.* Rumsey agreed that the outside of the CT cabinet would have been marked with the CT ratio, so even a post-installation visual check of that external surface would have been sufficient to indicate a difference between the CT ratio as indicated at the service location and the CT ratio being used in ComEd's billing system. Tr. at 361-362. To the extent ComEd argues that its field meter technicians would not have billing system information, that discloses an even deeper flaw in ComEd's meter accuracy and testing regime. As LAZ witness Bernhardt pointed out, ComEd does not affirmatively undertake to give its own billing department a definite confirmation of all the technical information that is essential to a correct customer billing process. LAZ Ex. 3.0 at 4.

V. COMED'S POSITION

A. Billing Error vs. Meter Error

ComEd argued that there are two different kinds of errors that impact customers' bills: billing errors and meter errors. ComEd further argues that Part 410 and Part 280 of the Administrative Code treat these two kinds of errors differently – both in terms of what ComEd must do before issuing adjustments to customer bills and in terms of the time period for which ComEd is permitted to recover. On the one hand, there are no prerequisites to issuing adjustments for billing errors, but ComEd is only permitted to recover for a two year period. On the other hand, there are testing and inspection requirements that ComEd must meet before issuing adjustments for meter errors, but ComEd is permitted to recover for a longer period, up to the life of the meter. ComEd Init. Br. at 1.

ComEd argued that this case involves a simple billing error. As stated by ComEd, ComEd inadvertently under-billed LAZ for almost two and a half years. ComEd admitted it made this billing mistake. As soon as ComEd discovered the error – which ComEd argued was caused by an incorrect billing multiplier, also known as a constant, in ComEd's CIMS – ComEd fixed it. And pursuant to the regulations, even though the error went back almost two and a half years, ComEd limited its billing adjustment for this previously unbilled service to two years from to the date it provided the delivery service: June 2008 to May 2010. ComEd Init. Br. at 1.

ComEd claimed that despite the fact that ComEd had adhered to the regulations and that LAZ was not asked to pay for almost six months of delivery service that it in fact received and used, LAZ is not satisfied with this outcome. LAZ takes the position that the error was actually a meter error. According to ComEd, the evidence shows that LAZ is incorrect. A fully accurate meter registers the electricity flowing through it at 100%. The regulations define meter error as under or over registration of that electricity in excess of 2%. Therefore, in order to experience meter error, a meter must register less than 98% or greater than 102% of actual electricity flowing through it. ComEd argued that LAZ has

failed to meet its burden to prove by a preponderance of the evidence that the meter at issue in this case registered outside of this acceptable range. ComEd Init. Br. at 1-2.

ComEd asserted that to the contrary – the evidence shows that at all times the equipment at issue at the LAZ Facility was functioning as it was designed to do, and was accurately registering energy usage within the 98% to 102% range determined by the regulations. Moreover, ComEd argued that the evidence shows what caused the error at issue: an incorrect constant in CIMS. According to ComEd, this is clearly a billing error that is not in any way related to a meter malfunction. ComEd further stated that even if there was evidence that the equipment did register energy usage erroneously – and according to ComEd there is not – ComEd met the testing and accuracy requirements in the regulations, and would actually be allowed to correct the under billing for the entire two and a half years as opposed to the two year limit applicable to billing errors. ComEd Init. Br. at 2.

ComEd contended that LAZ twists and tortures the regulations to come up with an interpretation that suits its purpose. ComEd stated that what LAZ essentially argues is that ComEd must go above and beyond the testing and accuracy requirements in the regulations and conduct additional testing – as specified by LAZ – to ensure that mistakes never happen. As ComEd stated, there are two main problems with this. First, that is not the regulatory balance the Commission has struck. The regulations prescribe specific testing and accuracy requirements and contemplate that pursuant to those requirements, some mistakes will still occur. Second, the additional testing that LAZ recommends is a useless exercise that would not have prevented the billing error in this case. ComEd Init. Br. at 2.

ComEd argued that in order to compensate for the lack of merit in its case, LAZ rails against ComEd – accusing ComEd of being a “recidivist utility” and of suffering from “judicial Tourette’s syndrome.” LAZ Reply to Response of ComEd to First Motion *In Limine* (March 14, 2016) at 9; LAZ Second Motion *In Limine* (March 11, 2016) at 2. ComEd further stated that LAZ has in effect waged war against ComEd, filing five motions to strike and obtaining and using patently false “admissions.” ComEd argued that it admitted only that it made a billing mistake. ComEd stated that it regrets making that mistake. ComEd argued, LAZ’s own expert admitted that ComEd’s policies and procedures regarding testing and accuracy comply with the regulations. According to ComEd, the Commission should enter judgment in favor of ComEd. ComEd Init. Br. at 2-3.

In reply, ComEd noted that LAZ’s Initial Brief is more notable for what it does not say than for what it does say. LAZ’s Initial Brief never claims that the LAZ Meter experienced under-registration of electricity usage in any amount, let alone under-registration that rises to the level of meter error as defined by the regulations. According to ComEd, LAZ’s entire case, however, rests on a finding of under-registration or meter error. ComEd Reply Br. at 1.

ComEd stated that LAZ argues that 83 Ill. Adm. Code 410.200 is applicable to this case, specifically that Section 410.200(h)(1) requires ComEd to refund the amounts LAZ paid for delivery of energy that LAZ consumed because ComEd allegedly failed to perform the type of post-installation inspection that LAZ recommends. See, e.g., LAZ Init. Br. at

8. But ComEd observed that Section 410.200(h)(1) prohibits adjustments only for under-registration when testing and accuracy requirements have not been met. ComEd Reply Br. at 1. ComEd argued that LAZ has not provided any evidence that the LAZ Meter under-registered electricity usage in any amount, let alone in excess of 2%. Indeed, as ComEd contended, the undisputed evidence in this case shows that at all times, the LAZ Meter was accurately registering LAZ's energy usage.

Therefore, according to ComEd, LAZ's entire argument that ComEd was prohibited from making an adjustment to LAZ's bill because ComEd allegedly did not perform a post-installation inspection is not valid because Section 410.200(h)(1) prohibits adjustments only in cases where there is under-registration. ComEd contended that the regulation LAZ claims prohibits ComEd's billing adjustment in this case is therefore inapplicable and the Commission's only lawful course of action is to enter an order denying relief to LAZ and finding in favor of ComEd. ComEd Reply Br. at 1-2.

Mr. Rumsey stated that almost every error that results in a change to a customer bill will in some way involve a meter. ComEd Ex. 1.0 at 10. But that does not mean that every error is a meter error. *Id.* ComEd stated that there are, in fact, two types of errors that result in changes to customers' bills: (1) meter errors as regulated by Part 410; and (2) unbilled or mis-billed errors, as regulated by Part 280. See also ComEd Ex. 1.0 at 10; ComEd Init. Br. at 7.

As ComEd discussed in its Initial Brief, the regulations narrowly and purposefully define meter error as under or over registration of electricity usage in excess of 2%, *i.e.*, registration less than 98% or greater than 102%. See generally 83 Ill. Adm. Code 410.10 *et seq.*, specifically 83 Ill. Adm. Code 410.140 - 410.200. ComEd stated that in turn, ComEd's policies and procedures regarding meter testing and inspection are only geared toward preventing, detecting, and correcting meter error. ComEd Ex. 1.0 at 10. They will not prevent, detect, or correct error related to something other than a malfunctioning meter and/or its associated equipment. *Id.* ComEd Init. Br. at 7.

ComEd argued that this distinction between meter errors and billing errors is important because Part 410 contains the pre-installation testing and post-installation inspection requirements that a utility must meet before the utility can issue a billing adjustment due to meter error. Part 280, relating to billing errors, does not contain those testing and inspection requirements. So, as ComEd argued, whether ComEd met the Part 410 testing and inspection requirements is only directly relevant if the error at issue here is a meter error as opposed to an unbilled error. ComEd Ex. 1.0 at 12. ComEd asserted that this is an important preliminary – and potentially dispositive – issue in this case. ComEd Init. Br. at 7-8.

1. Part 410

a. Meter Error

ComEd argued that meter error only occurs when a meter is tested and found to be malfunctioning because it is running too fast (over-registering), too slow (under-registering), non-registering, or on analog meters exhibiting "creep" as that term is defined in the regulations. ComEd Ex. 1.0 at 6; 83 Ill. Adm. Code 410.200(c)-(e), (g). Specifically, meter error exists "whenever any test by any entity or by the Commission shows a meter

to have an average error of more than 2%.” See 83 Ill. Adm. Code 410.200(a) and (b). Section 410.10 defines “average error” as “the difference between 100% and the average percent registration as defined in Section 410.150(d).” 83 Ill. Adm. Code 410.10; ComEd Init. Br. at 8.

Section 410.150(d) provides that the “average percent registration of a watt-hour meter shall be determined by adding the light load registration to 4 times the heavy load registration and dividing that quantity by 5.” 83 Ill. Adm. Code 410.150(d). Section 410.150(e)(1)(A) applies the same standards to demand meters. In this manner, the regulations narrowly and purposefully define meter error, and it is limited to whether electric usage registered in excess of the specified margin of error on the physical meter. ComEd stated that it is important to note that even incorrect registration of electric usage within that margin of error does not rise to the level of meter error. ComEd noted that LAZ did not even claim that the LAZ Meter over or under registered electric usage, let alone over or under registered in excess of the 2% margin of error. ComEd Init. Br. at 8-9.

b. Pre-Installation Testing

Pre-installation testing is also governed by specific regulations: 83 Ill. Adm. Code 410.140 *et seq.* Those regulations provide the protocol for meter testing, including sample testing procedures. See, *e.g.*, 83 Ill. Adm. Code 410.180; Tr. at 349-350. Specifically, ComEd stated that the Commission has approved (and ComEd uses) the ANSI/ASQC Z1.4-1993 sampling procedure as provided in 83 Ill. Adm. Code 410.180(a)(1). ComEd Ex. 1.0 at 5; ComEd Init. Br. at 9.

ComEd further stated that for those meters selected in the sample process, Section 410.150, titled “Meter Accuracy Requirements,” outlines test criteria for determining the accuracy of meters as well as providing the limits of accuracy for the tests. ComEd Ex. 1.0 at 6; 83 Ill. Adm. Code 410.150(a) and (b). If a meter can pass the tests presented in Section 410.150(a), within the limits identified in Section 410.150(b), it is considered to be accurately recording power usage. The test criteria presented in Section 410.150(a) are: Light Load test, Heavy Load test, and Power Factor test. The limits of accuracy vary from 1% to 2%. 83 Ill. Adm. Code 410.150(b), 410.180(f), 410.200(a) and (b).

Mr. Rumsey testified that in addition, prior to sample testing, ComEd requires that its manufacturers test all new meters prior to shipment to ComEd. ComEd Ex. 1.0 at 5; Tr. at 349; 83 Ill. Adm. Code 410.110 (1) (contemplating “testing data provided by the manufacturer that is used by the entity for acceptance testing of the meter”). Each shipment contains an electronic list of meters with serial numbers, types, sizes, and test results for each meter. ComEd Ex. 1.0 at 5. ComEd loads that information into its Automated Metering Infrastructure (“AMI”) Device Management database (“ADM”). *Id.* ComEd performs similar manufacturer and sample testing on associated equipment, such as CTs. *Id.* at 7. ComEd noted that the LAZ Meter underwent pre-installation testing and passed. ComEd Init. Br. at 9-10.

c. Post-Installation Inspection

In addition to pre-installation testing, for meters with associated instrument transformers – such as CTs – the regulations require that the utility also conduct a post-installation inspection under load within 90 days after installation. 83 Ill. Adm. Code 410.155. Mr. Rumsey stated that during this inspection, a utility technician makes sure that the current and voltage wiring from the associated equipment to the meter fitting is correct. ComEd Ex. 1.0 at 9. Mr. Rumsey noted that because the inspection is under load, the technician is able to ensure that the current flowing through the meter is forward as opposed to backward or reverse. *Id.*; ComEd Init. Br. at 10.

As stated by Mr. Rumsey, the point of this is to determine – as far as is possible without actually testing the meter – that the meter is accurately measuring customer energy consumption. *Id.* According to ComEd, the regulations do not call for further testing during this inspection because prior to installation, the meter and CTs were tested and deemed accurate. Tr. at 381. Thus, Mr. Rumsey testified that after installation the utility need only determine that “the connection between the two is proper and ... the current and everything is flowing through forward,” then “we can say that it’s accurately recording the customer’s usage because they’ve all been certified as being accurate.” Tr. at 381-382. ComEd provided evidence that its pattern and practice would have been to conduct this inspection and ComEd argued that there is no evidence to indicate that ComEd failed to conduct this inspection.

ComEd stated that Section 410.155 does not apply to all meters that ComEd installs. It applies specifically to “any meter with associated instrument transformers and/or phase-shifting transformers.” 83 Ill. Adm. Code 410.155. ComEd noted that LAZ recognized this distinction, stating that post-installation inspections “under Section 410.155 are done only for transformer-rated metering installations ...” LAZ Init. Br. at 19. From this limited applicability, LAZ deduced that the purpose of a post-installation inspection is to protect “only large, high-dollar value customers,” and that a post-installation inspection must therefore be a test. *Id.* See also LAZ Ex. 3.0 at 8 (implying that there should be higher testing and inspection standards for well-heeled customers who provide more revenue to ComEd). ComEd argued that this is incorrect. ComEd Reply Br. at 12.

ComEd stated that the purpose of a post-installation inspection is to ensure the proper connection between a meter and its associated transformers. That is why it applies only to meters with associated equipment, as opposed to all meters. As Mr. Rumsey testified, the regulations do not call for further testing during this inspection because prior to installation, the meter and CTs were tested and deemed accurate. Tr. at 381. Thus, as stated by ComEd, after installation the utility need only determine that the connection between the two is proper and therefore the meter will accurately record the customer’s usage. *Id.* at 381-382; ComEd Reply Br. at 12.

Moreover, ComEd asserted that if the regulations intended to require post-installation testing, as LAZ argues, the regulations would likely require post-installation testing of all meters, not just meters with associated equipment. And, surely Section 410.155 would provide some indication of what type of testing ComEd would allegedly need to perform – by reference to the meter accuracy requirements in other portions of

Part 410 or otherwise. ComEd observed that Section 410.155 contains no such discussion. ComEd Reply Br. at 12-13.

d. Part 410 Contemplates that Some Errors Will Still Occur

Mr. Rumsey stated that the pre-installation testing and post-installation inspection help to ensure that the meter and associated equipment are accurate and that the meter does not experience meter error, *i.e.*, over or under registration in excess of 2%. ComEd Ex. 1.0 at 6. ComEd further stated that this testing and inspection, however, will not prevent all meter errors. Indeed, the Commission contemplates that a certain amount of these errors will occur – hence the existence of Section 410.200. ComEd argues that the regulations also provide that corrections to metering data due to meter error may extend back to the in-service date of the meter or the date the customer first occupied the premises at issue. 83 Ill. Adm. Code 410.200(f); ComEd Init. Br. at 11.

ComEd argued that LAZ's position ignores this well-settled framework and seeks to apply the Section 410.200 testing and accuracy requirements without any evidence of any registration error, let alone meter error as defined by the regulations. ComEd contended that LAZ essentially cherry picks from the regulations, ignoring those subsections of Section 410.200 that would impede its recovery or expand the time period for ComEd's billing adjustment. ComEd stated that this is improper. "Administrative regulations have the force and effect of law and are interpreted with the same canons as statutes." Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 at ¶ 38, citing Madigan v. Illinois Commerce Comm'n, 231 Ill. 2d 370, 380 (2008). "Regulatory provisions, like statutory provisions, must be read in concert and harmonized." *Id.* at ¶ 50. ComEd asserted that LAZ's position reads Section 410.200(h)(1) separate and apart from the remainder of the regulations. ComEd Reply Br. at 2-3.

ComEd stated that in order to understand the multiple flaws in LAZ's position, it is helpful to look at the full text of Section 410.200, as opposed to the single subsection that LAZ excerpts.

ComEd stated that in this case LAZ seeks to apply the Section 410.200(h)(1) testing and accuracy requirements without regard to the plain language of that subparagraph and without reference to the remainder of Section 410.200, and thus without any evidence of any under-registration, let alone under-registration rising to the level of meter error as defined by the regulations. ComEd noted that LAZ then inexplicably attempts to apply a different limitation period to the alleged corrections and adjustments for meter error than the one clearly articulated in Section 410.200(f). LAZ Init. Br. at 19 (applying the 2 year period in Section 280.100, which governs billing errors, not meter errors). ComEd Reply Br. at 5-6.

ComEd contended that LAZ apparently believes that every error – regardless of whether it involves under-registration or meter error – is subject to the testing and accuracy requirements in Section 410.200(h)(1), but not the billing adjustment period in Section 410.200(f). Compare, *e.g.*, LAZ Init. Br. at 3 (conflating Section 410.200 accuracy requirements related to meter error with Section 280.100 related to unbilled service); and 4 (conflating unbilled service with unpaid service); with LAZ Init. Br. at 4, 19 (applying 2 year period in Section 280.100 to all amounts at issue in this case). ComEd argued that

the Commission should reject this outright. ComEd also stated that LAZ's position is contrary to the evidence in this case. ComEd Reply Br. at 6.

2. Part 280

Section 280.100, titled "Previously Unbilled Services," applies to situations where something other than a meter error has caused a customer to be billed incorrectly. This includes human error related to the billing process that may result in billing mistakes.

b) No customer shall be liable for unbilled or mis-billed service after expiration of the applicable period except in those instances to which 83 Ill. Adm. Code 500.240(a), 83 Ill. Adm. Code 410.260(c), or the following subsections of this section apply.

83 Ill. Adm. Code 280.100; ComEd Init. Br. at 11-12.

ComEd stated that it utilizes specific procedures, such as Constant Reports generated by CIMS, to detect and correct unbilled errors. These reports, however, will not prevent such errors. Indeed, the Commission contemplates that a certain amount of these errors will occur – hence the existence of Section 280.100. ComEd argues that unlike situations involving meter error, however, the Commission has not set forth any testing and accuracy requirements related to these errors. The Commission has, however, instituted a two-year limitation on re-billing for unbilled errors. 83 Ill. Adm. Code 280.100(b)(2); ComEd Init. Br. at 12.

ComEd argued that it is worth noting that LAZ itself also contemplates that billing errors may occur. Specifically, LAZ has a project manager review bills prior to payment. LAZ Ex. 1.0 at 5-7. ComEd noted that the project manager "and the accounts payable function focuses on the total amount of the bill" and if "something unusual appeared in the bill, LAZ would investigate it with the supplier." *Id.* at 5, 6. Interestingly, ComEd contended, LAZ has offered no evidence showing that when LAZ's bill went down by about 600%, LAZ "investigated." See ComEd Ex. 3.04 (showing decline); ComEd Ex. 8.0 (explaining decline). According to ComEd, LAZ only "investigated" when the bill went back up to LAZ's normal levels. See, e.g., LAZ Ex. 1.0 at 5-6; ComEd Ex. 1.01, Affidavit of Thomas R. Rumsey, ¶¶ 12, 13; ComEd Init. Br. at 12-13.

B. The Error in this Case

1. There Was No Meter or Associated Equipment Error

For the Commission regulation regarding "Corrections and Adjustments for Meter Error" – Section 410.200 – and its testing and inspection requirements to apply, a test must show the meter to have an average error of more than 2%. 83 Ill. Adm. Code 410.200(a)-(b), (h). Mr. Rumsey stated that the test results for the LAZ Meter were: 100.01% in Heavy Load; 100.00% in Light Load; and 100.01% in Power Factor. ComEd Ex. 1.0 at 13; ComEd Ex. 1.06. As ComEd noted, this is well within both the 1% to 2% error allowed pursuant to the meter accuracy requirements in the regulations and the 2% error threshold for Section 410.200, *i.e.*, test results within the 98% or 99% to 101% or 102% range. 83 Ill. Adm. Code 410.150(b), (d), (e); 410.200(a)-(b), (h). ComEd Init. Br.

at 13. Therefore, ComEd argued that the LAZ Meter did not experience under-registration in any amount and certainly did not experience under-registration rising to the level of meter error. ComEd stated that Section 410.200 clearly does not apply. ComEd Reply Br. at 6.

Moreover, according to ComEd, it is undisputed that the LAZ Meter accurately recorded the stepped-down usage flowing through the LAZ CTs to the LAZ Meter. ComEd Ex. 1.0 at 15. There was no under-registration, over-registration, non-registration, or creep. *Id.* ComEd stated that it is also undisputed that the LAZ CTs were accurately stepping down the usage flowing through the LAZ CTs to the LAZ Meter. *Id.*; Tr. at 334 (LAZ witness Bernhardt issued his opinions in this case despite being unaware of whether the LAZ CTs functioned accurately and did not know that the LAZ CTs are still in use). ComEd noted that they did not cause under-registration, over-registration, non-registration, or creep. ComEd Ex. 1.0 at 15. Therefore, as ComEd stated there is no meter or associated equipment error and again Section 410.200 does not apply. *Id.* ComEd Init. Br. at 13; ComEd Reply Br. at 6-7.

In addition, as Mr. Rumsey testified, if the LAZ Meter or LAZ CTs had experienced error, ComEd would have removed the faulty equipment from service and notified the ComEd billing department of the percentage of error. ComEd Ex. 1.0 at 6. Mr. Rumsey stated that to the contrary, after ComEd corrected the constant in CIMS, the LAZ Meter and the LAZ CTs continued in service at the LAZ Facility. *Id.* at 14. According to Mr. Rumsey, this would not have happened if there had been any meter or associated equipment error. *Id.* ComEd Init. Br. at 14. Once again, ComEd noted that Section 410.200 clearly does not apply. ComEd Reply Br. at 7.

ComEd observed that LAZ attempted to cast doubt on these undisputed facts by stating that the testing that its witness recommends would “indisputably determine whether the LAZ meter was accurately measuring LAZ’s energy consumption” and that “CT burden testers of the type shown in LAZ Exhibit 2.2 would have confirmed whether the CT ratios on LAZ’s metering installation were correct.” LAZ Init. Br. at 18. ComEd stated that this is much ado about nothing. As ComEd has shown, none of this is in dispute: there is no evidence that the LAZ Meter over- or under-registered in any amount, let alone in excess of 2%; and there is no evidence that the LAZ CTs inaccurately stepped down the power traveling to the LAZ Meter. ComEd Init. Br. at 13-15. Therefore, as ComEd stated, there is no need to use testing to determine what the evidence already shows: the LAZ Meter and the LAZ CTs were accurate and did not experience any error. ComEd Reply Br. at 7.

Indeed, ComEd contended that LAZ’s own Exhibit A clearly states that ComEd “calculated the billing adjustment from 6/3/08 to 5/5/10 based on actual reads taken from the meter and made the appropriate corrections.” Ex. A to LAZ Init. Br. (emphasis added). If the meter had under- or over-registered, the actual meter reads would have been incorrect, and ComEd would not have been able to utilize them. Instead, ComEd would have had to determine a percentage of error and would have then issued a metering data correction to the actual meter reads based on that percentage of error. See 83 Ill. Adm. Code 410.200(a); ComEd Reply Br. at 8.

ComEd concluded that whatever happened in this case, it is not, never was, and never will be under-registration or meter error. The issue here is that LAZ was billed for only a fraction of its actual usage because ComEd used the wrong constant in CIMS for a two-and-a-half year period. ComEd Ex. 1.0 at 15-16. Contrary to LAZ's statements in its Initial Brief (LAZ Init. Br. at 17), ComEd stated that it has shown that no matter what constant is used, the registration of usage by the meter remains unaffected. ComEd Ex. 1.0 at 15-16. As stated by ComEd, the re-billing in this case was therefore not attributable in any respect to an error in the LAZ Meter or LAZ CTs. ComEd Ex. 3.0 at 8; ComEd Ex. 1.0 at 13-14. The re-billing described above was a billing error attributable solely to the incorrect meter constant in CIMS. *Id.* ComEd Reply Br. at 8.

2. The Error Was a Billing Error

ComEd asserted that the issue here is that LAZ was billed for only a fraction of its actual usage because ComEd used the wrong constant in CIMS for a two and a half year period. ComEd Ex. 1.0 at 15-16. As stated by Mr. Rumsey, no matter what constant is used, however, the registration of usage by the meter remains unaffected. *Id.* According to ComEd, the re-billing in this case was therefore not attributable in any respect to an error in the LAZ Meter or LAZ CTs. ComEd Ex. 3.0 at 8; ComEd Ex. 1.0 at 13-14. Rather, as ComEd argued, the re-billing described above was attributable solely to the incorrect meter constant in CIMS. *Id.*; ComEd Init. Br. at 14.

Ms. Spitz testified that the incorrect constant, or CONSTANT IN CIMS as shown in the Constant Report (ComEd Ex. 3.03), caused ComEd to under-bill LAZ for delivery service by a factor of 600. ComEd Ex. 3.0 at 6. As Ms. Spitz explains in her testimony, this is borne out by a simple mathematical ratio between the incorrect constant and the correct constant of 1 to 600 and 0.0003 to 0.18. *Id.* Therefore, ComEd argued that it properly back billed for a two year period pursuant to Section 280.100. ComEd Init. Br. at 14.

ComEd stated that if this had been a meter error, ComEd would have back-billed for a longer period: to the in-service date of the LAZ Meter. See 83 Ill. Adm. Code 410.200(f). But according to ComEd, because this is not a meter error, Part 410 – and its testing and accuracy requirements and longer billing adjustment period – does not apply. ComEd stated that even LAZ's own witness describes this as "an obvious failure in ComEd's customer billing process." LAZ Ex. 2.0 at 13. Further, ComEd argued that LAZ claims that the two-year limitation applicable to billing errors applies to the instant situation – as opposed to the longer period applicable to meter errors – essentially admitting that this is a billing error, not a meter error. See, e.g., Complaint at ¶¶ 17 and 46, page 12 ¶ (e). ComEd contended that this should be the end of the inquiry in this case, and the Commission should enter judgment in favor of ComEd. ComEd Init. Br. at 14-15.

C. Section 410.200 Testing and Accuracy Requirements

1. The Requisite Pre-Installation Tests

ComEd stated that the manufacturer, Elster Manufacturing, tested the LAZ Meter on October 25, 2007. Mr. Rumsey testified that ComEd entered that test data into

ComEd's pre-2014 meter shop database, known as Automated Micro Systems ("AMS"). ComEd Ex. 1.0 at 13; ComEd Ex. 1.06. In addition, as shown on ComEd Ex. 1.07, the LAZ Meter was part of a shipment that ComEd tested through its sampling procedure. ComEd Ex. 1.0 at 13. Average percent registration results for sample tested meters between 98% and 102% are considered accurate and acceptable by the Commission. See 83 Ill. Adm. Code 410.180(f); See also ComEd Ex. 1.0 at 13. ComEd stated that the test results indicate that the LAZ Meter was well within this range and was accurately registering power usage. ComEd Init. Br. at 15.

Moreover ComEd argued that similar to the LAZ meter, it is undisputed that the manufacturer, General Electric, would have tested the LAZ CTs prior to shipping them to ComEd. ComEd Ex. 1.0 at 14. In addition, the LAZ CTs were part of a shipment that ComEd tested through its sampling procedure. *Id.* at 14; ComEd Ex. 1.08. Mr. Rumsey testified that ComEd would not have accepted this shipment otherwise. *Id.*; ComEd Init. Br. at 15-16.

2. The Requisite Post-Installation Inspection

ComEd stated that it has a pattern and practice of conducting post-installation inspections "[w]ithin 90 days after installation or exchange of any meter with associated instrument transformers." 83 Ill. Adm. Code 410.155; ComEd Ex. 1.0 at 8. Mr. Rumsey stated that in conducting these inspections, ComEd dispatches an F&MS technician to the customer location. Tr. at 379-380; ComEd Ex. 1.0 at 8-9. The F&MS technician fills out an "Aux Inspection Form," which includes information about CT model type and size, checks to make sure that the current and voltage wiring from the affiliated equipment to the meter fitting is correct, and that electricity is flowing forward. ComEd Ex. 1.0 at 9; ComEd Ex. 1.03; Tr. at 365. The technician then enters information from the Aux Inspection Form into his MDT. Tr. at 369. This information is then transferred to an F&MS clerk who inputs the data into CIMS. *Id.* ComEd argued that LAZ's own expert indicates that this is an appropriate method of conducting post-installation inspections. *Id.* at 316; LAZ Ex. 3.1 at 2 (stating "current transformers can be visually confirmed using the nameplate data"). ComEd Init. Br. at 16.

ComEd's records show that it installed the LAZ Meter on December 14, 2007. ComEd Ex. 1.0 at 14. As ComEd noted, it was not able to locate the Aux Inspection Form or any other documents or information related to the installation or post-installation inspection of the LAZ Meter. *Id.* at 15; Tr. at 385-387. ComEd argued that this is not, however, proof by a preponderance of the evidence that ComEd acted contrary to its pattern and practice of conducting post-installation inspections with regard to the LAZ Meter. See 5 ILCS 100/10-15 (standard of proof in contested case is preponderance of the evidence). ComEd Init. Br. at 16-17.

ComEd stated that with regard to installation information, regulations require that ComEd retain only the date and location of installation. 83 Ill. Adm. Code 410.110(a) (4); 420, Appendix A ¶59 (m). As long as ComEd maintains that information, the regulations do not require that ComEd retain any installation documentation. *Id.* And, as ComEd further stated, because ComEd installed the LAZ Meter on December 14, 2007, even if the three-year retention period commonly imposed for other types of meter and

associated equipment records is applied here, ComEd was not required or even likely to retain any records of the LAZ Meter installation and post-installation inspection beyond mid-March of 2011. 83 Ill. Adm. Code 410.110. Section 410.110 deals with “service watt-hour meters” and “vary-hour meters.” ComEd asserted that at the evidentiary hearing in this docket, the ALJ asked ComEd witness Mr. Rumsey whether a watt-hour meter is a recorder meter and whether a vary-hour meter is a recorder meter. Tr. at 393. Mr. Rumsey responded that they are not recorder meters. *Id.* The converse, however, is true: a recorder meter can be considered a special type of “service watt-hour meter” as that term is defined in the regulations. ComEd Init. Br. at 17.

3. Burden of Proof

In reply, ComEd noted that LAZ claims there is a presumption that ComEd did not perform a post-installation inspection. LAZ Init. Br. at 8-9. ComEd argued that LAZ mischaracterizes the case law in this regard. As the Complainant, LAZ has the burden of proof in this case. Beery v. Breed, 311 Ill. App. 469, 475 (2d Dist. 1941) (cited by LAZ). This means that LAZ must prove all elements of its claim by a preponderance of evidence. 5 ILCS 100/10-15 (standard of proof is preponderance of evidence). “There is no presumption against a defendant ... when the plaintiff, carrying the burden of proof, has not made a prima facie case, and such presumption cannot be used to relieve the plaintiff from the burden of proving his case.” Beery, 311 Ill. App. at 475. LAZ has not met its burden to prove either that there was meter error in this case or that ComEd failed to perform a post-installation inspection. ComEd Reply Br. at 14.

ComEd further argued that even if LAZ had met this burden, in order to obtain a presumption, LAZ would have been required to make a foundational showing that, among other things, ComEd could have produced evidence of a post-installation inspection and that ComEd’s excuse for failing to produce that evidence was not reasonable. Roeseke v. Pryor, 152 Ill. App. 3d 771, 781 (1st Dist. 1987); DeBow v. City of East St. Louis, 158 Ill. App. 3d 27, 36 (5th Dist. 1987) (both cited by LAZ). ComEd contended that LAZ did not make this showing. To the contrary, ComEd adequately stated the fact that it could not locate records related to the post-installation inspection in this case and why it could not locate those records. ComEd Init. Br. at 16-17; ComEd Ex. 1.0 at 15; Tr. at 385-387. ComEd stated that LAZ attempts to further muddy the waters by insinuating that ComEd’s installation and inspection records are the same as ComEd’s meter test records. LAZ Init. Br. at 8-12. ComEd has stated that this is incorrect. See, e.g., ComEd Init. Br. at 9-11, 15-19. The regulations regarding record retention recognize this distinction as well. *Id.* at 17. ComEd Reply Br. at 14-15.

4. The Additional Testing that LAZ Recommends

ComEd contended that in an attempt to make ComEd’s compliance with the regulations appear inadequate, LAZ puts forth three arguments: (1) that ComEd was required to perform a post-installation test; (2) that in performing that test ComEd should have used a method specified by LAZ’s expert witness, Mr. Richard B. Bernhardt; and (3) that this testing would have revealed the error in this case. According to ComEd, LAZ is incorrect on all three points. ComEd Init. Br. at 17.

a. The Regulations Require a Post-Installation Inspection, Not a Post-Installation Test

ComEd stated that in some places, the regulations use the term “test.” See, e.g., 83 Ill. Adm. Code 410.150. In other places, the regulations use the term “inspection.” See, e.g., 83 Ill. Adm. Code 410.155. And in still other places the regulations use both terms, i.e., “inspected and tested.” See, e.g., 83 Ill. Adm. Code 410.160. LAZ treats these separate and distinct terms as having the same meaning in every instance. ComEd argued that LAZ is incorrect. ComEd Reply Br. at 9.

ComEd further argued that “[t]he fundamental rule of statutory construction is to give effect to the intent of the legislature.” City of Chicago v. Old Colony Partners, L.P., 364 Ill. App. 3d 806, 813 (1st Dist. 2006). “Giving the statutory language its plain meaning is the best means of ascertaining legislative intent.” *Id.* “In doing so, each word, clause or sentence should be given its reasonable meaning and not be discarded as superfluous.” *Id.* “Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of the statute so that, if possible, no term is rendered superfluous or meaningless.” Land v. Board of Educ. of City of Chicago, 202 Ill. 2d 414, 422 (2002). See also Springfield Sch. Dist. No. 186 v. Dep’t of Revenue, 384 Ill. App. 3d 715, 720 (4th Dist. 2008) (same). Moreover, it is “well established that, by employing certain language in one instance, and entirely different language in another, the legislature indicated that different results were intended.” People v. Ousley, 235 Ill. 2d 299, 313-314 (2009). ComEd Reply Br. at 9.

ComEd asserted that the plain language of the regulations requires a post-installation inspection, not a test. 83 Ill. Adm. Code 410.155. ComEd stated that in addition, the Commission has specific limitations on how often ComEd should be required to test meters – no more than once every 6 to 12 months. See, e.g., 83 Ill. Adm. Code 410.190, 410.195. According to ComEd, requiring back-to-back pre and post installation testing would conflict with these regulations. Moreover, as ComEd argued, if ComEd has just tested the meter pre-installation, it would be a waste of time and money to immediately test the meter again post-installation. ComEd Ex. 1.0 at 9. ComEd further stated that to be clear: no testing is required and no testing occurs during the post-installation inspection. ComEd Ex. 5.0 at 1-2; ComEd Init. Br. at 17-18.

As ComEd noted, the Commission itself has rejected a similar interpretation of these regulations, with the Commission’s Office of General Counsel (“OGC”) stating that the argument involves:

constructions of the Commission rules which are not supported by any evidence and are contrary to the plain language of the rule. Amcor cites 83 Ill. Adm. Code 410.155, which requires a “post-installation inspection under load,” and then argues that ComEd failed to perform “post-installation testing” (Brief, pp. 32 and 39). 83 Ill. Adm. Code 410.155 plainly does not require the testing established within 83 Ill. Adm. Code 410.200(h)(1). The Commission correctly rejected Amcor’s unsupported argument. See Order, pp. 17-

19 (ComEd's response) and p. 26, 3rd Ordering ¶, R. Vol. 5, C-01218–C-01220 and C-01227; ALJ's memo, *Id.*, C-01170 and C-01198. See also *A-32; A-37; Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 479 (1994) [it is improper to depart from the plain language in construing statutes].

Despite Amcor's contentions, the Commission, the author of the rules, has properly applied its rules to the present situation. The Commission's Order of April 2, 2014 should be affirmed as will be stated below in this Brief. R. Vol. 5, C001202–C-01228.

Amcor v. ICC and ComEd, Appellate Court Docket No. 1-15-2985, Brief of Respondent ICC (March 8, 2016) ("OGC Brief") at 40-41. According to ComEd, the Commission should similarly reject LAZ's argument here. ComEd Init. Br. at 18.

ComEd stated that although LAZ's own witness on this topic initially claimed that there is no distinction between a meter test and a post-installation inspection, Mr. Bernhardt later admitted that he has no knowledge or experience regarding meters in Illinois or meters regulated by the Commission. Tr. at 310. ComEd argued that further, he agreed that the regulations clearly distinguish between testing and inspection in this context. *Id.* at 308-309. Otherwise the use of the terms "inspected and tested" together would render one of those terms mere surplusage.

ComEd stated that LAZ's tortured interpretation of the regulations – by an expert with no experience in Illinois – extends to other topics as well, including what qualifies as "standards" pursuant to the regulations. See, e.g., Tr. at 242-246, 285-289, 337-339. ComEd further asserted that Mr. Bernhardt also seems to be laboring under the misapprehension that ComEd has test meters that can handle the level of current that a customer like LAZ uses without a CT stepping down that current. *Id.* at 285; 326-329. According to Mr. Rumsey, if this were true, ComEd would not need to utilize CTs in the first place. See ComEd Ex. 1.0 at 7; ComEd Init. Br. at 18-19.

In reply, ComEd noted that LAZ's citation to unrelated amendments to Section 410.180, governing Sample Testing Procedures, is inapplicable to the question of whether the Commission's use of the word inspection in Section 410.155, governing Installation Inspections, is equivalent to if the Commission had used the word test. See LAZ Init. Br. at 16. Similarly, as ComEd stated, LAZ's attempt to equate ComEd's movement from individually testing every commercial meter to sample testing those meters – in order to meet the requirements for pre-installation testing in Section 410.160, Initial Tests – as some sort of an admission that inspection and testing are the same is unavailing. LAZ Init. Br. at 16; ComEd Reply Br. at 11.

ComEd also stated that LAZ asserts that sample testing is "appropriate for residential, small commercial, and other self-contained metering installations, but not for metering installations associated with instrument transformers, such as this case involves." LAZ Init. Br. at 16. ComEd argued that the regulations contain no such prohibition. The regulations provide the sampling procedures that must be used for sample testing "non-demand, self-contained single phase or three-wire network meters," but they do not prohibit utilities from using those sampling procedures for sample testing

other categories of meters, nor do they prohibit sample testing other types of meters in general. Compare Section 410.180(a) (specifically limited to certain types of meters) with Section 410.180 (b)-(h) (not limited to those types of meters); and Section 410.110(a)(1) (contemplating “testing data provided by the manufacturer that is used by the entity for acceptance testing of the meter” and not limited to the meter types specified in Sections 410.180(a)); and 410.160 (contemplating testing at locations other than the meter shop of the utility). ComEd Reply Br. at 11, fn 2.

ComEd clarified that no testing is required and no testing occurs during the post-installation inspection. ComEd Ex. 5.0 at 1-2. ComEd has never done or said anything to the contrary. In any event, ComEd has stated that a post-installation test would not have revealed the constant error in this case. ComEd Init. Br. at 20-22; ComEd Reply Br. at 11.

b. The Testing that LAZ Recommends Does Not Meet the Part 410 Accuracy Requirements

ComEd contended that as a preliminary matter, LAZ has played a shell game with ComEd and the Commission, changing and refining the description of the testing it purports to recommend each time ComEd points out a flaw in LAZ’s position. Compare ComEd Cross Ex. 2, Affidavit of Richard B. Bernhardt, ¶ 16 (during testing, meter is isolated from CTs, so that it may be tested while in service without hazard to utility personnel) with Tr. at 255-260 (meter only isolated in some tests and sometimes only while connection is made, then “deisolate[d]”); compare LAZ Ex. 2.0 at 11-12 (discussing “field test” in direct testimony as “under load, meaning in actual use, at the customer’s service location ... so that certain controlled load test points are examined, namely light load and full load.”) with LAZ Ex. 3.0 at 8 (discussing test in surrebuttal testimony “under actual customer load”) and Tr. at 266-267 (admitting the only way to test these load points is using a test load, not the customer’s actual load, and therefore the testing he recommends in surrebuttal – using customer’s actual load – is different from what he recommends in direct). See also LAZ Ex. 3.0 at 1: and Tr. at 319-333 (depicting several testing methods that may or may not have been discussed in testimony); LAZ Ex. 3.0 at 3-4 and Tr. at 274 (conflating testing procedures and billing procedures). ComEd Init. Br. at 19.

ComEd stated that in any event, the final iteration of the post-installation testing LAZ would have ComEd perform – assuming a post-installation test was required, and it was not – does not meet the meter accuracy requirements in the regulations. As argued by ComEd, LAZ ultimately admitted that using the customer’s own load as it recommends, it is impossible to utilize the light load, heavy load, and power factor criteria that the regulations require. Compare 83 Ill. Adm. Code 410.150(a)(1)-(3) with Tr. at 266-267. Consequently, according to ComEd, under LAZ’s test, it would be impossible to determine if the meter is accurate as defined by the regulations. See 83 Ill. Adm. Code 410.150. Likewise, as ComEd further asserted, it would be impossible to determine if the meter is experiencing meter error as defined by the regulations. See 83 Ill. Adm. Code 410.200; ComEd Init. Br. at 20.

Therefore ComEd argued, for an entity regulated by the Commission, the test that LAZ recommends is a meaningless exercise. Furthermore as ComEd asserted, if ComEd

were to expend funds on this type of testing, it could be deemed an imprudent and unreasonable course of action leading to disallowance of cost recovery. 220 ILCS 5/1-102(a)(iv) (utilities can recover only those costs “prudently and reasonably incurred”). According to ComEd, LAZ’s position is therefore inexplicable, particularly given the fact that LAZ’s own expert lists using a test load as an appropriate test method. Tr. at 334-335; LAZ Ex. 3.1; ComEd Init. Br. at 20.

c. The Testing that LAZ Recommends Would Not Reveal the Use of the Incorrect Constant

ComEd contended that even without reference to the requirements set forth in the regulations, the test that LAZ recommends is an exercise in futility. Under either the test that ComEd performs pursuant to the regulations or the test that LAZ recommends, ComEd stated that it is undisputed that, “for a given period of time, the same exact current, voltage and phase angle pass through both the portable standard and the revenue billing meter under test.” LAZ Ex. 2.0 at 14; ComEd Ex. 5.0 at 8-9. As Mr. Rumsey stated in his rebuttal testimony, the portable standard or the entity performing the test then compares the electricity that flowed through the standard during this test to the electricity that flowed through the meter at issue. ComEd Ex. 5.0 at 4. That comparison provides the percentage of accuracy of the meter at issue. *Id.* ComEd argued that this provides an apples to apples comparison because the same electricity flowed through both the portable standard and the meter. *Id.*; Tr. at 279-282; ComEd Init. Br. at 20-21.

As ComEd stated, for the type of test that the regulations require – utilizing a test load factoring in billing multipliers, *i.e.*, the constant at issue in this case, is irrelevant and unnecessary. Doing so is simply an exercise in multiplication, *i.e.*, multiplying the result for the portable standard by 600 and multiplying the result for the meter under test by 600. *Id.* Thus, as ComEd stated, the test that the regulations require would never reveal the constant error in this case. But cf. LAZ Ex. 3.0 at 5 (claiming that the TESCO portable meter test standard would have instantly identified an error related to a CT) with Tr. at 278-279, 264 (admitting that a meter test with a portable standard that is isolated cannot instantly identify an error related to a CT). ComEd Init. Br. at 21.

ComEd further stated that LAZ maintains that the test it recommends – using the customer’s own load – would reveal the error. ComEd contended that what LAZ fails to understand is that even if the entity testing the meter uses the customer’s own load, factoring in the constant is similarly irrelevant and unnecessary. This is still simply an exercise in multiplication, as the testing entity would undoubtedly apply the same constant to the results from both the portable standard and the meter under test. Tr. at 283-284, 368, 373; ComEd Init. Br. at 21.

According to ComEd, it appears however, that LAZ is assuming that the testing entity would obtain two different constants from two different sources, *e.g.*, from the equipment under test and from CIMS. But if this is the case, ComEd stated that there is no need to perform any of the equipment testing that LAZ recommends. The testing entity could simply compare the constant information shown on the equipment and the constant information in CIMS to determine if there is a constant error. As Ms. Spitz testified, this is, of course, precisely what ComEd’s Constant Report does and is exactly how ComEd discovered the constant error in this case. ComEd Ex. 3.0 at 3-4; ComEd Init. Br. at 22.

5. LAZ Attempts to Institute a Rulemaking under the Guise of a Contested Case

ComEd stated that the Commission has the power to hear several different kinds of cases, including contested cases and rulemakings. “Contested case’ means an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.” 5 ILCS 100/1-30. “Rulemaking’ means the process and required documentation for the adoption of Illinois Administrative Code text.” 5 ILCS 100/1-90. It is undisputed that the instant docket is a contested case, not a rulemaking. Complaint at 1 (bringing case under 83 Ill. Adm. Code 200.170, Formal Complaints, not 83 Ill. Adm. Code 200.210, Petition for Rulemakings); 83 Ill. Adm. Code 200.40 (complaint cases are contested cases). ComEd Reply Br. at 15.

ComEd argued that in this contested case, LAZ seeks to substitute its method of testing “meter installations” for the method that ComEd uses to test meters. See, e.g., LAZ Init. Br. at 12, 18-20. ComEd did not dispute that portions of its tariffs refer to “meter installations.” See LAZ Init. Br. at 17-18, fn 4. ComEd argued that is not, however, relevant to the issues presented here. The relevant Sections in Part 410 clearly refer to meters as opposed to the broader phrase “meter installations” and the even broader definition that LAZ sometimes uses that would encompass ComEd’s separate billing system. See generally 83 Ill. Adm. Code 410. Cf. Section 410.190(a) and Section 410.195(a) (referencing “meter installation locations” only with regard to where meter tests requested by the customer and the entity, respectively, shall be performed); and Section 410.155 (discussing inspection of meter that has associated equipment, not testing of associated equipment). ComEd Reply Br. at 15, and fn. 3.

ComEd stated that LAZ’s substitution of testing methods is problematic for two reasons. First, Part 410 tells ComEd what it must do in terms of meter testing and accuracy. As ComEd has shown, the tests LAZ recommends do not comply with the standards set forth in Part 410. ComEd Init. Br. at 19-20. Second, the Commission audits ComEd’s “meter testing equipment and methods at least every 3 years.” Section 410.140(e). Thus, the Commission knows and approves of what ComEd is doing in order to comply with the Commission’s meter testing policies and procedures as expressed in the regulations. ComEd argued that it is not up to LAZ to change those requirements or expectations in the context of a contested case. As LAZ clearly states: “Adopting LAZ’s position likely means that ComEd will reform its meter testing procedures” LAZ Init. Br. at 20. This is an issue for a rulemaking; it is not something the Commission should address in the context of a contested case. ComEd Reply Br. at 15-16.

Moreover, ComEd noted that LAZ claims it would only take a “few minutes” to run the tests that LAZ recommends. LAZ Init. Br. at 14, 20. LAZ further claims that these test are “relatively easy” and “speedy.” *Id.* at 19. ComEd stated that LAZ has no cost analysis or other evidence to support this claim. ComEd further stated that LAZ certainly has not shown that its “modification or exemption” from the regulations “is economically and technically sound” as required by the regulations. Section 410.30. This “few minutes”

estimate certainly cannot account for travel time, fuel costs, dispatch and coordination time, or any other associated activities or costs. ComEd Reply Br. at 16.

Although LAZ paints ComEd's meter testing and post-installation inspection procedures as the product of a callous and indifferent business decision on the part of ComEd, ComEd contended that is simply not accurate. LAZ Init. Br. at 14. ComEd stated that it complied with the regulations. ComEd Init. Br. at 15-17. This is one instance out of many – undoubtedly hundreds of thousands of meter installations – where a constant error occurred despite the implementation of the Commission and ComEd's sound policies and procedures. The Commission could certainly craft regulations that require more aggressive, perhaps even redundant, testing and accuracy requirements, or even prerequisites to issuing adjustments for billing errors as opposed to meter errors. But that is not what the operative regulations call for. As stated in ComEd's Initial Brief, the operative regulations prescribe specific testing and accuracy requirements and contemplate that pursuant to those requirements, some errors will still occur. ComEd Init. Br. at 2, 11. The Commission also recognizes that not all errors are meter errors. Some errors are billing errors. ComEd Init. Br. at 7-13; ComEd Reply Br. at 16-17.

Finally, contrary to LAZ's claims, ComEd clarified that it has not said that all post-installation field tests are unfeasible or impractical. Cf. LAZ Init. Br. at 10-11. Indeed, the evidence shows that ComEd has equipment similar to that espoused by Mr. Bernhardt and that ComEd utilizes such equipment for efficient and effective field testing when such testing is appropriate. ComEd Ex. 5.0 at 6. ComEd stated that the point that LAZ fails to understand is that there is always the possibility of human error, particularly when data entry is involved. In this case, for example, the constant information could have been entered incorrectly into CIMS after either the installation or following the post-installation inspection. Tr. at 374-376 (discussing the two different data points involved in entering CT information into MDT and CIMS). Indeed, this is why Sections 280.100 and 410.200(h)(1) and (f) exist, because the Commission knows that despite best efforts, mistakes leading to billing or meter errors will happen. ComEd Init. Br. at 2, 11; ComEd Reply Br. at 17.

D. Factual Disputes

1. The Actual Dollar Value of the Unbilled Service

ComEd argued that if the error in this case is deemed a meter error and the Commission finds that a preponderance of the evidence shows that ComEd did not meet the Part 410 testing and accuracy requirements, then the Commission must determine the dollar value of the unbilled delivery service provided between June 3, 2008 and May 3, 2010. ComEd stated that the evidence in this proceeding shows that this amount is \$180,943.15. ComEd Ex. 4.0 at 1:-2. According to ComEd, that is the only amount remotely related to any type of ComEd error. *Id.*; ComEd Init. Br. at 22.

ComEd stated that despite LAZ's insinuations to the contrary, the \$36,625.07 in charges in the Disconnection Notice was related to unpaid service provided by ComEd between May 3, 2010 and September 1, 2010 – after ComEd resolved the constant issue – and was not related to any type of ComEd error. ComEd reiterated: the \$36,625.07 in charges in the Disconnection Notice had nothing to do with the two years of unbilled

service (due to the incorrect constant) provided between June 3, 2008 and May 3, 2010. ComEd Ex. 4.0 at 2; ComEd Init. Br. at 22.

a. The Unbilled Service

ComEd provided detailed testimony and exhibits showing that the total value of the delivery service provided to LAZ between June 3, 2008 and May 3, 2010 was \$225,484.52. ComEd Ex. 4.0 at 4; ComEd Ex. 4.03 at CCLP 0000009-11; ComEd Ex. 4.04. In that time frame, using the incorrect constant, ComEd billed LAZ – and LAZ correspondingly paid – for \$44,541.37 in delivery service. As ComEd stated, this means that LAZ had \$180,943.15 in unbilled delivery service charges (\$225,484.52 total value minus \$44,541.37 previously billed). ComEd Ex. 4.0 at 4; ComEd Init. Br. at 22-23.

Ms. Jamison testified that when ComEd discovered the error, ComEd cancelled the incorrect bills totaling \$44,541.37 for the June 3, 2008 to May 3, 2010 time period. ComEd Ex. 4.0 at 5; ComEd Ex. 3.0 at 6; ComEd Ex. 4.03 at CCLP 0000006-8. ComEd then rebilled the full amount of the \$225,484.52 for the same time period. See ComEd Ex. 4.03 at CCLP 0000009-11. ComEd Ex. 4.0 at 5. The rebill encompassed two additional days, May 4 and 5, because it was keyed to the actual meter read date of May 5. *Id.* As Ms. Jamison further stated, cancelling the incorrect bills caused CIMS to issue a credit in the amount of \$44,541.37, because LAZ had already paid those bills. *Id.*; ComEd Ex. 4.03 at CCLP 0000009. Thus, ComEd stated that ComEd charged LAZ – and LAZ paid – \$180,943.15 for unbilled delivery service between June 3, 2008 and May 3, 2010. ComEd Ex. 4.0 at 5; ComEd Init. Br. at 23.

In reply, ComEd noted that LAZ claims, without citation to any authority, that the “total amount directly or indirectly paid by LAZ to ComEd for alleged unbilled delivery services charges is \$259,937.85.” LAZ Init. Br. at 4. According to ComEd, this is false. The evidence shows that the actual amount “directly or indirectly paid by LAZ for alleged unbilled delivery services charges” is \$180,943.15. ComEd Init. Br. at 22-23; ComEd Ex. 4.0 at 1-2, 4; ComEd Ex. 4.03 at CCLP 0000009-11; ComEd Ex. 4.04; ComEd Reply Br. at 19.

b. The Disconnection Notice

ComEd stated that the \$36,625.07 at issue in the Disconnection Notice related to delivery service provided by ComEd to LAZ in a later time frame: between May 3, 2010 and September 1, 2010. ComEd Ex. 4.0 at 5; ComEd Ex. 4.05. According to ComEd, contrary to LAZ’s claims, LAZ was billed for this delivery service between July 9, 2010 and September 1, 2010, within two years after the delivery service was provided. ComEd Ex. 4.0 at 5. Specifically, the Disconnection Notice concerned four months of delivery service charges that total \$36,143.30; five late fees that total \$1,196.83; and a credit in the exact amount of those late fees, that results in total charges and a corresponding payment amount by LAZ of \$36,143.30. ComEd Ex. 4.0 at 6; ComEd Ex. 4.03 at CCLP 0000011-12; ComEd Ex. 4.06; ComEd Init. Br. at 23.

As ComEd stated, the sum of the delivery service charges and the late fees, \$37,340.13, is slightly higher than the \$36,625.07 reflected in the Disconnection Notice, because LAZ incurred two late fees totaling \$715.06 on September 20 and 21, 2010, after ComEd issued the Disconnection Notice. ComEd Ex. 4.0 at 6. ComEd credited the

amount of all late fees so this did not impact the amount that LAZ eventually paid. *Id.* Furthermore, as ComEd stated, none of the charges related in any way to the constant error or the unbilled service provided prior to May 2010. ComEd Init. Br. at 24.

ComEd stated that after ComEd resolved the incorrect constant in CIMS, LAZ failed to pay its bills for the next four months. After ComEd issued the Disconnection Notice, ComEd and LAZ communicated about the delivery service charges and late fees. LAZ Ex. 1.0 at 7. This resulted in ComEd providing a credit for the full amount of the late fees and LAZ providing payment for the delivery service charges. *Id.* ComEd asserted that none of this has anything to do with the ComEd error at issue in this case. ComEd Init. Br. at 24.

c. Dispatch of ComEd Witness Mr. Derrick Moore to the LAZ Facility

ComEd noted that LAZ claims that Mr. Moore testified that Ms. Spitz dispatched him to the LAZ Facility after Ms. Spitz reviewed the Constant Report. LAZ Init. Br. at 13. ComEd argued that this is not accurate. Mr. Moore was dispatched on April 6, 2010. ComEd Ex. 2.0 at 1. Subsequently, Ms. Spitz first learned of the constant error on April 23, 2010. ComEd Ex. 3.0 at 4. In fact, as ComEd stated in its Initial Brief, it is possible that Mr. Moore's visit to the LAZ Facility on April 6, 2010 is what caused the LAZ Meter to show up on the April 23, 2010 Constant Report that brought this issue to Ms. Spitz's attention. ComEd Init. Br. at 4-5. In any event, Ms. Spitz never dispatched Mr. Moore anywhere. ComEd Reply Br. at 17-18.

d. Ms. Spitz's Testimony

ComEd observed that LAZ states: "ComEd witness Spitz testified that the reason ComEd pays attention to these meter discrepancy reports and sends technicians out for meter verifications is that a 'large dollar value' may be associated with a discrepancy that involves a transformer-rated meter." LAZ Init. Br. at 13. ComEd argued that this is a gross mischaracterization of Ms. Spitz's testimony and apparently part of LAZ's strategy to cast ComEd as "indifferent." See, e.g., LAZ Init. Br. at 19, 20; ComEd Reply Br. at 18.

ComEd stated that Ms. Spitz testified that after reviewing the Constant Report, she "obtained and reviewed a CIMS Meter Reading history for the LAZ meter" and "also requested that ComEd's Field & Meter Services ('F&MS') department perform a re-verification of the meter number and the size and type of the CT." ComEd Ex. 3.0 at 5. Ms. Spitz further testified that she did this because: "[w]henver it appeared to me that there could be a large dollar value associated with a constant discrepancy, it was my pattern and practice to request a re-verification in order to confirm that the equipment information in CIMS was correct." *Id.* at 5; ComEd Reply Br. at 18.

In other words, because it appeared to her that a large dollar value could be associated with this constant error, she was unwilling to re-bill the customer based solely on the Constant Report until she re-verified the details of the equipment at issue. This testimony does not in any way imply that ComEd only reviews Constant Reports because "a 'large dollar value' may be associated with a discrepancy." LAZ Init. Br. at 13. This

testimony does show, however, that far from being indifferent, Ms. Spitz was exceedingly interested, careful, and cautious in executing her job duties. ComEd Reply Br. at 18-19.

2. Rule 216 Issues

ComEd observed that LAZ claims that “correspondence from ComEd dated October 28, 2010, a copy of which is attached as Exhibit A to its brief, states that ComEd installed the meter with an incorrect meter constant.” LAZ Init. Br. at 4. LAZ’s Exhibit A says nothing of the sort. In fact, that document states that LAZ was “billed for electricity recorded on meter 141362866 located at 25 N. Michigan, Chicago, IL, with an incorrect meter constant that resulted in your being billed for less electricity than you actually used. We have identified the reason for this situation and it has been corrected.” Ex. A to LAZ Init. Br. ComEd Ex. 1.0 at 8, 13, 2; ComEd Ex. 3.0 at 3.

3. Qualifications of ComEd Witness Mr. Rumsey

ComEd took issue with LAZ’s disparagement of Mr. Rumsey’s opinion “on what a post-installation inspection at a customer’s service location would disclose” because “during all his years with ComEd he never field-tested a meter, nor did he ever field-test or ‘inspect’ a CT at a customer service location.” LAZ Init. Br. at 12. To set the record straight: the evidence shows that over the course of his career Mr. Rumsey tested over 60,000 meters in Illinois, pursuant to the standards set forth in the regulations. Tr. at 350. To the contrary, ComEd stated that the evidence does not show how many meters Mr. Bernhardt tested, or if he ever tested a single meter. See, e.g., LAZ Ex. 2.0 at 2-5; Ex. A to LAZ Response to ComEd Motion for Summary Judgment (Sept. 25, 2015). It certainly does not show whether he ever field-tested a meter, nor is there any evidence that he ever field-tested or inspected a CT at a customer service location. Cf. LAZ Init. Br. at 12. Moreover, ComEd stated that Mr. Bernhardt admitted that he has no knowledge or experience regarding meters in Illinois or meters regulated by the Commission. Tr. at 310. According to ComEd, LAZ’s criticism is misplaced. ComEd Reply Br. at 20.

4. ComEd’s Meter Constant Discrepancy Report

ComEd stated that LAZ claims that ComEd’s “Meter Testing Procedures Are Deficient and Cause Unnecessary Waste for Both the Customer, ComEd and the Commission.” LAZ Init. Br. at 13. ComEd argued that LAZ bases this claim on several factual errors, as well as its understanding that ComEd’s Constant Report is part of ComEd’s “approach to satisfying the Commission’s testing and accuracy requirements applicable to transformer rated meters.” *Id.* ComEd stated that LAZ then makes the unsupported statement that this Constant Report involves a “profligate waste of money, time and effort.” *Id.*; ComEd Reply Br. at 20.

ComEd contended that first, the evidence shows that the Constant Report is not part of ComEd’s meter testing procedures; it is a function of the billing department. It is generated by the billing department, using information contained in the CIMS billing software, and it is reviewed by billing department employees. ComEd Ex. 3.0 at 4. ComEd argues that the Constant Report is simply not related to ComEd’s meter testing policies and procedures. Second, ComEd stated there is no evidence in the record of the incremental cost to ComEd to generate and review the Constant Report. There is

certainly no evidence to show that it involves a “profligate waste of money, time and effort.” ComEd Reply Br. at 21.

5. The February 13, 2014 Admissions

ComEd reiterated and incorporated by reference its prior arguments that formal discovery is discouraged at the Commission and that the February 13, 2013 Admissions (“Admissions”) should not have been deemed admitted. 83 Ill. Adm. Code 200.340; ComEd Response in Opposition to LAZ’s Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto (Dec. 17, 2012) at 2-11; ComEd’s Response to LAZ’s Motion to Strike Portions of ComEd’s Motion for Summary Judgment and Supporting Affidavits and to Strike the Schedule For Same (July 24, 2015) at 13. ComEd Init. Br. at 24-25.

ComEd stated that it provided timely objections and in some cases paired those objections with fulsome responses. ComEd Motion for Summary Judgment (June 30, 2015), Appendix at 14-18; ComEd Response in Opposition to LAZ’s Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto (Dec. 17, 2012) at 7; ComEd’s Response to LAZ’s Motion to Strike Portions of ComEd’s Motion for Summary Judgment and Supporting Affidavits and to Strike the Schedule For Same (July 24, 2015) at 7-8, and fn4. ComEd argued that this is not a forum where requests for admission are routinely utilized and this is not a situation where the party responding to the requests for admission was evasive or non-responsive in those responses. ComEd Init. Br. at 25.

6. Rule 216 Requirements

LAZ has argued that ComEd’s failure to provide a sworn statement with its responses and objections to LAZ’s Requests for Admission was fatal. ComEd argued that the merits of LAZ’s argument are flawed. The text of the rule itself clearly only requires that denials be sworn. There is no similar requirement for responses or written objections:

(c) Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission. If good faith requires that a party deny

only a part, or requires qualification, of a matter of which an admission is requested, the party shall specify so much of it as is true and deny only the remainder. Any objection to a request or to an answer shall be heard by the court upon prompt notice and motion of the party making the request. The response to the request, sworn statement of denial, or written objection, shall be served on all parties entitled to notice.

Ill. S. Ct. R. 216(c) (emphasis added); ComEd Init. Br. at 25-26.

The underlined portion of the Rule was added, pursuant to amendment May 29, 2014 effective July 1, 2014. ComEd explained that every case that LAZ cites in support of its argument is prior to this clarifying amendment. LAZ's Motion *In Limine* (March 4, 2016) at 5-7. See also Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto (Nov. 13, 2012); LAZ's Reply in Support of its Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto (Jan. 11, 2013). ComEd Init. Br. at 26.

ComEd asserted that the Illinois Supreme Court has adopted the U.S. Supreme Court's statutory retroactivity test in Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

Under the Landgraf test, if the legislature has clearly indicated what the temporal reach of an amended statute should be, then, absent a constitutional prohibition, that expression of legislative intent must be given effect. However, when the legislature has not indicated what the reach of a statute should be, then the court must determine whether applying the statute would have a retroactive impact, *i.e.*, "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." [citation omitted] If there would be no retroactive impact, as that term is defined by the court, then the amended law may be applied.

* * *

As examples of statutory changes that normally do not have a retroactive impact, the Court mentioned statutes that affect jurisdiction and statutes that affect certain procedural rules. Landgraf, 511 U.S. at 273–76, 114 S.Ct. at 1501-03, 128 L.Ed.2d at 257–59. The Court also observed: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment [citation] or upsets expectations based in prior law."

Commonwealth Edison Co. v. Will County Collector, 749 N.E.2d 964, 971-72 (Ill. 2001); ComEd Init. Br. at 26.

ComEd contended that LAZ did not have a vested right, "*i.e.*, an interest protected from legislative interference by the due process clause of the Illinois Constitution," to a

sworn response. Will County, 749 N.E.2d at 969. Moreover, even prior to Landgraf, “[a]nother exception found in Illinois law” was “that a statutory amendment may be applied ‘retroactively’ where the legislature enacted the amendment merely to clarify an existing law that was ambiguous, rather than to change the law.” People v. Ramsey, 735 N.E.2d 533, 540 (Ill. 2000) (concurrency). The amendment here, as ComEd explained, simply clarifies the italicized portion of Rule 216(c) above, which indicates that only a denial must be sworn. ComEd stated that courts have inconsistently and in some cases improperly applied this portion of the Rule, as evidenced by LAZ’s citations. ComEd Init. Br. at 26-27.

ComEd stated that in addition, even if responses must be sworn, the case cited by LAZ in support of this proposition discusses the fact that in certain situations, responses to requests for admission may be certified by a party’s attorney. In re Application of the County Treasurer and County Collector of Cook County, Illinois (Z Financial, LLC v. ALSJ, Inc.), 2012 IL App (1st) 112897, ¶¶ 33-35 (discussing dicta in prior case and limiting holding requiring the party as opposed to the attorney to certify the responses to the facts of the case at hand). ComEd Init. Br. at 27.

ComEd further stated that LAZ’s conclusion that ComEd was not permitted to “answer and object simultaneously to the same matter” (LAZ’s Motion In Limine (March 4, 2016) at 5) is also not necessarily true. In Favia v. Ford Motor Co., the First District affirmed denial of a motion to deem facts admitted where the defendant’s response contained both an objection and a statement that the party was unable to admit or deny. Favia v. Ford Motor Co., 381 Ill. App. 3d 809, 821-22 (1st Dist. 2008). ComEd explained that even the case that LAZ relies on for this proposition states that only those portions of the co-mingled answers and objections that amounted to objections should have been discarded. City of Chicago ex rel. Schs. v. Schorsch Realty Co., 95 Ill. App. 2d 264, 278 (1st Dist. 1968). As stated by ComEd, the court did not hold that both the answers and objections should have been thrown out, the draconian result that LAZ has achieved here. *Id.*; ComEd Init. Br. at 27.

In reply, ComEd stated that LAZ argues that ComEd’s responses to its requests for admission “failed to comply with the most fundamental requirements of S. Ct. Rule 216” because ComEd’s objections and responses were not sworn. LAZ Init. Br. at 5. LAZ is incorrect. As stated in ComEd’s Initial Brief, the plain language of Rule 216 and its clarifying amendment indicate that only denials must be sworn. See ComEd Init. Br. at 25-27. Specifically, Rule 216 only uses the word “sworn” directly in front of the phrases “statement denying” or “statement of denial.” Ill. S. Ct. R. 216(c). It does not use the word “sworn” in front of the words “answer,” “response,” or “objection.” *Id.*; ComEd Reply Br. at 13.

Moreover, ComEd argued that in addition to the canons of statutory interpretation discussed previously, “[t]he punctuation of a statute is to be considered and given weight unless, from inspection of the entire statute, it is clear it must be ignored to give effect to the legislature’s intent.” Old Colony, 364 Ill. App. 3d at 813. The amendment to Rule 216 separates the descriptions of the different ways to answer a Rule 216(c) request with commas, stating: “The response to the request, sworn statement of denial, or written

objection, shall be served on all parties entitled to notice.” Ill. S. Ct. R. 216(c). This amendment makes clear that there are three options in responding to a request for admission: a response, a denial, or an objection. *Id.* The amendment also makes clear that only a denial must be sworn. *Id.* If the legislature intended the word “sworn” to modify all three options, it would have used different word order and punctuation. ComEd Reply Br. at 13.

ComEd contended that LAZ has consistently addressed this issue as if there are only two options: a sworn denial or a sworn objection. LAZ Init. Br. at 5-6; ALJ Ruling (Feb. 13, 2014) at 4. As ComEd stated, the plain language of Rule 216 and its clarifying amendment show that this position is incorrect, and LAZ’s claim that this clarifying amendment does not impact this case is unavailing. ComEd argued that the Commission should disregard the “Admissions” in this case. ComEd Reply Br. at 13-14.

7. Admissions that Appear to be Untrue

ComEd argued that although LAZ would have the ALJ believe that the Supreme Court rules are inflexible and must be harshly enforced, the very case that LAZ cites for this proposition also states that requests for admission are essentially discovery tools and “circuit courts must be allowed to exercise discretion over the conduct of pretrial discovery.” Bright v. Dicke, 652 N.E.2d 275, 276-77 (1995). And as discussed above, a judge may disregard an admission if it appears that facts in the admission are untrue. Ellis v. Am. Family Mut. Ins. Co., 322 Ill. App. 3d 1006, 1010 (4th Dist. 2001); New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 24 (4th Cir. 1963); ComEd Init. Br. at 28.

ComEd stated that it has provided extensive testimony and documentary evidence detailing that the “Admissions” are untrue. For example, the amount claimed in LAZ’s “Admission” No. 6 is \$259,937.85. See Notice of ALJ’s Ruling (Feb. 13, 2014) at 5. But according to ComEd, that figure does not correspond to any of the amounts that ComEd’s evidence shows are related to the constant error. Moreover, it does not match the \$225,484.52 total value of the delivery service charges, it does not appear to account for the \$44,541.37 in credits for previously billed and paid delivery service charges, nor does it reconcile to the actual \$180,943.15 in unbilled delivery service charges after that credit is applied. *Id.* In short, ComEd argued, it has shown that number to be false in every respect. ComEd Init. Br. at 28.

As stated in ComEd’s Response to LAZ’s Motion In *Limine*, the remaining “Admissions” regarding the dollar amount at issue are irrelevant, vague, and/or incomplete. See ComEd Response to LAZ’s Motion In *Limine* (March 10, 2016) at 6-10. Briefly, ComEd stated, “Admission” No. 1 simply states the dollar value plainly referenced on the face of the Disconnection Notice. See Notice of ALJ’s Ruling (Feb. 13, 2014) at 5. “Admission” No. 2 states only that ComEd made a calculation, but does not state the result of that calculation. *Id.* “Admission” No. 3 states only that the amount in the Disconnection Notice was related to delivery service charges, without providing a date range. *Id.*; ComEd Init. Br. at 28-29.

ComEd also stated that “Admission” No. 5 is a further example of the false – or at best misleading – nature of the “Admissions.” According to ComEd, the evidence shows that ComEd calculated the unbilled delivery service in May 2010. ComEd Ex. 3.0 at 6-7.

ComEd did not issue bills directly to LAZ because LAZ elected to obtain its supply from MidAmerican Energy Company (“MidAmerican”) under the single-bill option, which means that LAZ received one monthly bill from MidAmerican containing both its energy supply and delivery service charges. ComEd Ex. 4.0 at 3-4; LAZ Ex. 1.0 at 4. ComEd stated that LAZ’s own exhibits show that MidAmerican sent LAZ billing documents in July 2010 containing dollar values related to those ComEd calculations. LAZ Exs. 1.2 and 1.3; ComEd Init. Br. at 29. ComEd states that, in a letter dated September 9, 2010, it directly informed LAZ of the facts surrounding the claim for unbilled services. ComEd Ex. 8.0 at CCLP 0000084. ComEd issued the unrelated Disconnection Notice eleven days later, on September 20, 2010. ComEd Init. Br. at 29-30. ComEd stated that it again provided this September 9, 2010 letter to LAZ in discovery, on August 13, 2012. See ComEd’s Response to LAZ’s First Set of Data Requests, labeled as LAZ 1.01 and its attachment LAZ 1.01_Attach 1 (excerpt entered into the record as ComEd Ex. 8.0). Subsequently, on October 5, 2012, LAZ issued its First Set of Requests for Admission, containing Admission No. 5:

5. Prior to the date of the Disconnection Notice, ComEd had not notified LAZ of the amount of any claim of ComEd for alleged unbilled service charges.

Notice of ALJ’s Ruling (Feb. 13, 2014) at 5; Exhibit A to LAZ’s Motion *In Limine* (March 4, 2016); ComEd Init. Br. at 30.

ComEd asserted that there are several problems with this “Admission.” First, prior to the date of the Disconnection Notice, ComEd had notified LAZ – through MidAmerican – of the amount of the unbilled delivery service charges. Second, prior to the date of the Disconnection Notice, ComEd had notified LAZ directly of the facts related to the unbilled delivery service charges. Third, the Disconnection Notice and the unbilled delivery service charges are not related – they are two separate issues that LAZ attempts to conflate in the “Admission.” ComEd argued that this behavior by LAZ – calculated to obtain a misleading or false admission – is unseemly at best. ComEd Init. Br. at 30.

Lastly ComEd contended that the remainder of LAZ’s “Admissions” suffer from similar flaws in veracity. Compare Admission Nos. 4 and 9 (stating ComEd programmed LAZ Meter with incorrect meter constant) and Admission Nos. 7, 8, 9, 10 (stating ComEd tested LAZ Meter on October 25, 2007 and April 6, 2010) with ComEd Ex. 1.0 at 8 and ComEd Ex. 3.0 at 4 (showing that ComEd utilizes meter constants in CIMS; ComEd does not program meter constants into meters) and ComEd Ex. 1.0 at 13-14 (showing that the manufacturer tested the LAZ meter and ComEd accepted those test results using its sample testing procedures; ComEd never tested the LAZ Meter). ComEd Init. Br. at 30-31.

8. Use of Requests for Admission in this Case

ComEd argued that LAZ’s use of requests for admission in this instance – not ComEd’s discovery responses or testimonial evidence – is actually what is improper. ComEd further explained that the purpose of requests for admission is to streamline cases and make them more efficient by establishing uncontroverted facts ahead of time so that only the disputed issues can be clearly and succinctly presented. In re County

Treasurer (Z Financial, LLC v. ALSJ, Inc.), 2012 IL App (1st) 112897, ¶ 27. They are intended to be used “to expedite litigation, to obviate the difficulty and expense in procuring evidence, and to compel an admission by the adverse party of evidence which is generally of incontrovertible character ... use of the procedure to request the admission of controverted facts should be avoided ...” People v. Mindham, 253 Ill. App. 3d 792, 797-98 (2d Dist. 1993) (cited by LAZ for the proposition that requests to admit are binding; party in Mindham failed to answer requests at all). ComEd Init. Br. at 31.

Indeed as ComEd stated, the Mindham case that LAZ relies on quotes People v. Strasbaugh, 194 Ill. App. 3d 1012, 1017 (4th Dist. 1990), which states: “request to admit facts is designed to eliminate the need to prove facts which are not in dispute, and it is not appropriate for a party to prove her case by use of this procedure where ultimate facts are fairly disputed.” Another Illinois appellate court similarly stated:

The purpose of Supreme Court Rule 216 is noted in the Historical and Practice Notes found under this rule, where it is stated: “But the request to admit should be used to obviate the necessity of proof of facts as to which there is no real dispute, such as delivery of a deed or ownership of property. Using it to blanket the case and to cover matters that are fairly disputed is a waste of the time of counsel for both sides and the court.”

Sims v. City of Alton, 172 Ill. App. 3d 694, 699 (5th Dist. 1988) (citation omitted). Here, ComEd argued, LAZ is attempting to do just that: to use requests for admission to establish controverted facts and prove its case. According to ComEd, this has certainly not streamlined the process or made it more efficient. ComEd Init. Br. at 31-32.

9. Waiver of Admissions

ComEd further argued that LAZ itself has placed several of the “Admissions” in contention, thereby waiving its use of those “Admissions.” Compare LAZ Ex. 1.0 at 6-8 and LAZ Exs. 1.2 through 1.5 (discussing billing dates, charges, and amounts, as well as Disconnection Notice and alleged lack of communication regarding billing error) with Notice of ALJ Ruling (Feb. 13, 2014) Admission Nos. 1, 2, 3, 5 and 6 (addressing same subjects). Where a party presents evidence concerning admissions, it waives those admissions. Moy v. Ng, 341 Ill. App. 3d 984, 991 (1st Dist. 2003) (cited by LAZ); ComEd Init. Br. at 32.

In summary, ComEd stated that its responses to LAZ’s requests for admission were not improper and should not have been discarded by the ALJ. ComEd asserted that the result is that LAZ has obtained “Admissions” that are patently false. According to ComEd, LAZ is undoubtedly aware of this and has even waived some of the “Admissions,” yet it continues to advocate for use of the “Admissions” and insists on wasting the Commission’s and the parties’ time and resources further litigating this issue. ComEd Init. Br. at 32.

VI. COMMISSION ANALYSIS AND CONCLUSIONS

A. Testing and Inspections

1. Meter/Transformer Measuring Units

LAZ operates parking lots and consumes a large volume of electric energy at its facilities. This docket concerns delivery services at a metered service facility at one of LAZ's downtown parking lots.

Electric meters are not designed to measure large amounts of current flowing through them. For this reason, the metering service provided to larger customers like LAZ requires the use of more components. Meters at locations that use large amounts of electric energy need to be connected to transformers to reduce the amount of current entering the meter. The transformers associated with these measuring units are known as Current Transformers or "CTs". Because the amount of current measured by the meter is only a tiny percentage of the actual energy usage, the amount reported by the meter to the billing system must be multiplied by a billing multiplier. 83 Ill. Adm. Code 410.10. An accurate bill requires multiplying the reported meter usage data by the billing multiplier or constant. The billing multiplier information varies with the type of meter and with the size, number and type of the CTs.

The relevant regulations: "Standards Of Service For Electric Utilities And Alternative Retail Electric Suppliers", Part 410, provide a framework for residential meters and also for the more complex measuring devices providing service to larger use customers.

When a meter/transformer measuring unit is installed or replaced, the new unit must be incorporated into the ComEd billing system. For that to happen, a ComEd employee using a mobile electronic device must communicate the meter/transformer information from its physical location to the ComEd billing department. The billing department then inputs the information into the CIMS. ComEd Ex. 1.0 at 7. If incorrect information or no information about the meter/transformer combination is communicated at the time of installation, the system will generate incorrect bills until the correct information is entered in the system. The meter/transformer measuring device only generates a correct bill if its operating information is communicated to and incorporated in CIMS programming from the meter transformer location.

On December 14, 2007, ComEd installed the LAZ Meter and CTs at issue in this case. ComEd Ex. 1.0 at 14. The billing multipliers or constants for the new metering installation were not communicated by the installer from the meter/CT installation to the CIMS system. As a consequence, the system computed bills using the default value of one (no multiplication) instead of 600. ComEd's billing system used this incorrect value from December 2007 until May 3, 2010. As a result, LAZ's bills during that period reflected far less usage than what occurred. ComEd Ex. 3.0 at 7; ComEd Ex. 3.04.

As a preliminary matter, the Commission notes that this case is distinguishable from Amcor Flexibles, Inc. v. Commonwealth Edison Company, Docket No. 11-0033 ("Amcor"). The meter at issue in that case was a self-contained solid state unit. The metering installation in this docket consists of a meter and three current transformers.

Unlike the meter in Amcor, the meter/transformer unit has multiple components that must be integrated with the billing system at the time of installation and can only function when properly programmed and working together. Inherent in the proper installation of this multiple component metering installation is the communication of the operating parameters of the meter/transformer combination from the metering system location to the billing system. To insure that a proper meter/transformer installation has taken place, a post installation inspection of meters with associated instrument transformers must be made within 90 days pursuant to Section 410.155. In the absence of correct programming from the installation site and/or corrections arising from an on-site, post installation inspection, the under billing sanctions of Section 410.200(h)(1) apply.

Section 410.155 of the Illinois Administrative Code requires an inspection of any meter with associated instrument transformers within 90 days after installation or exchange to determine if the meter is accurately measuring customer energy consumption.

Section 410.200(h)(1) provides that corrections to metering data for under-registration may be accompanied by an adjustment to a customer's billing but in no case shall an adjustment to a customer's billing be made for under-registration if all testing and accuracy requirements of this Part have not been met.

The evidence demonstrates that the LAZ meter/CT information was not communicated to the billing system at the time of the installation of the new meter/CT equipment. ComEd also has no record of a post installation inspection occurring within 90 days of December 14, 2007 or at any other time prior to April 6, 2010. On that date, in 2010, ComEd dispatched an employee, Derrick Moore, to the LAZ metering installation for the purpose of obtaining information regarding the equipment in use by LAZ. ComEd Exhibit 2.03, entitled "Individual Order Completion Data Report" under the heading Issuance Comments, states that Mr. Moore was sent to the LAZ site because someone had discovered that the LAZ "meter is missing CT information." Significantly, obtaining the data and putting it into the billing system required an onsite inspection of the LAZ meter.

ComEd argued that the under billing that occurred here, caused by the failure to input meter constant information, is not a meter/transformer error but instead a billing error because the information is stored in its CIMS billing system. The Commission disagrees with this argument. Where the information is stored is not determinative. Part of the installation of a new meter transformer system requires informing the billing system of the characteristics of the meter and its CTs. This information is obtained from the meter/CT location and is required for accurate bills. The failure of ComEd to discover this mistake for two and a half years was caused by: 1) installation testing that failed to verify that the meter/CT installation and billing software were accurately measuring customer usage, and 2) the failure to conduct a post installation inspection within 90 days.

2. Part 280 and Part 410

ComEd argued the test and inspection requirements of Part 410 do not apply to this situation because this is a billing issue controlled by Part 280 rather than a meter

service installation and inspection issue involving Par 410 subsections as well. Part 280, among other things, delineates procedures governing billing, payments and refunds. ComEd contended, without reference to supporting language in the regulations, that the meter service testing and accuracy requirements of Part 410 do not apply to the meter/CT related errors in this case because they are billing errors rather than metering errors. ComEd. Init. Br. at 11. Contrary to ComEd's argument, the current version of Section 280.100, in effect since 2014, specifically states that it applies to measuring errors.

Section 280.100 Previously Unbilled Service reads:

Intent: This section provides for the billing and payment of previously unbilled service caused by errors in measuring or calculating a customer's bills.

The prior version of Section 280.100 does not include a statement of intent but makes no distinction between metering errors and any other type of billing error. The purpose of simple electric meters and more complex meter/transformer combinations is to measure electric usage. Metering service errors are measuring errors to which both Part 410 and Part 280 may apply.

Every incorrect bill involves a billing error. The incorrect bills in this case occurred because ComEd failed to correctly install and integrate LAZ's metering system into its billing system. The incomplete installation and the subsequent failure to perform a post installation on-site inspection are the causes of the under billing in this case. This docket involves a metering system error subject to the testing and accuracy requirements of Part 410.

The parties have presented extensive arguments about whether the meter service equipment in this case should have been the subject of a "test" or an "inspection." ComEd argued that the required tests would not have exposed the failure to inform the billing system about the appropriate billing multiplier. ComEd also argued that the testing suggested by LAZ's expert would also fail to disclose the error in question. Although ComEd acknowledged that the meter/CT information must be input into CIMS for accurate billing, ComEd's interpretation of the Part 410 meter/CT testing and inspection requirements do not require a verification that the meter/CT parameters have been communicated to the billing department or that the meter is accurately measuring usage.

ComEd failed to properly integrate the LAZ meter/CT facility into its billing system and then failed to conduct a post installation inspection that would have corrected the error. As a result, this meter/CT location provided incorrect data for two and a half years that resulted in substantial under billing. ComEd nevertheless asserted that the LAZ Facility was functioning properly and accurately registering energy usage. ComEd argued that the only error here was an incorrect constant in CIMS having nothing to do with its incomplete meter service equipment installation and its failure to conduct a required post installation inspection. ComEd Reply Br. at 8

ComEd also argued that the facts of this case support the conclusion that the Part 410 testing and inspection requirements have been met. In support of this argument ComEd contended that pre-installation batch testing procedures apply to three phase

meter/CT systems like the one at issue here. The regulation which it cites in support, Section 410.180 (83 Ill. Adm. Code 410.180), states:

Sample Testing Procedures

An entity that chooses to use sample testing shall use the procedures prescribed in any of the following documents (alone or in combination) to sample test non-demand, self-contained single-phase or three-wire network meters.

This regulation does not provide for sample testing of multi-phase meters that are not self-contained. The language of this regulation does not support ComEd's argument that the Commission imposed testing requirements of assembled multi-phase systems with transformers are satisfied by pre-installation sample testing of the meter alone.

ComEd argued that the LAZ meter was tested and found to be accurate. According to ComEd, testing the accuracy of an assembled multiple component measuring unit is not required. Unfortunately, a test of a meter by itself does not establish that the installed meter/transformer component system will function correctly and accurately measure usage. A meter/transformer installation like the one at issue will not accurately measure usage if the information to establish the meter/CT dependent billing multiplier is not communicated to the billing system. At the very least, the test of a meter/CT system should require documentation that the meter/CT information has been communicated to and received by the billing department. There is no such documentation in the record of this case.

ComEd argued that there is no need to determine that the system is functioning accurately as long as its parts are not found to be defective in the factory. ComEd Reply Br. at 12. The existence of this controversy demonstrates the illogic of that position.

The meter/CT measuring unit can only accurately measure usage if the entire measuring unit is operating correctly and it is integrated into the billing system to produce an accurate bill. Even though its parts may have individually passed manufacturer's pre-installation tests, the meter/transformer service in this case failed to perform its function (measuring energy usage) from the day it was installed. Every single meter/transformer installation would fail to accurately measure usage if its operating parameters were not integrated into the billing system from the meter/transformer location at the time of installation.

The Commission finds that the argument that no further tests or inspections in a multiple component measuring system are required or necessary to determine accurate measurement of usage if the pre installation components work individually is contrary to the evidence and the relevant regulations.

3. The 2010 On-Site Inspection Resulted in the Correction of the Under Billing

ComEd has repeatedly acknowledged that information about the type and size of meter and the multipliers for the transformers must be communicated to and input into the billing system for the system to work correctly. ComEd Ex. 1.0 at 7. At the time of

installation, a label is placed on installed meter/CT locations showing the correct meter constant and other information. Section 410.120(b).

The purpose of the post installation inspection is not solely, as ComEd contended, to determine if the CTs are connected and that current is running in the right direction. ComEd Ex. 1.0 at 9; ComEd Ex. 1.03. Section 410.155 specifically requires a post installation inspection of the meter with associated instrument transformers and/or phase-shifting transformers for the express purpose of determining if it is accurately measuring customer energy consumption.

ComEd argued that its pattern and practice of conducting post installation inspections is proof that one occurred here. However, it has no documentation of a post installation inspection in this case during the entire two and a half years the installation generated erroneous bills.

ComEd presented evidence that when it conducts a post installation inspection of a meter with associated instrument transformers, the technician is tasked with filling out an "Aux Inspection Form." The form requires information about the CTs and requires the technician to verify, among other things, that the wiring from the CTs to the meter is correct. The technician then inputs this data on the completed form into CIMS. ComEd Ex. 1.0 at 9.

ComEd has no Aux inspection form record, or any other record of a post installation inspection, for this location at any time from December 2007 until April 6, 2010. ComEd argues that the absence of this document is not proof that an inspection was not conducted because, despite the existence of this controversy in 2010, ComEd was only obligated to keep the Aux inspection form until 2011.

More telling than the absence of documentation, are the inaccurate bills this measuring unit generated for two and a half years. ComEd argued that the incorrect bills are not evidence of noncompliance with the post installation testing and inspection requirements because neither a test nor an inspection would have exposed the error.

Besides overlooking the point of the inspection – producing accurate bills – this assertion is contradicted by the evidence of the actual post installation inspection by ComEd employee, Derrick Moore, conducted April 6, 2010. Mr. Moore was sent to that location specifically to "update CIMS with CT information" and input into ComEd's data base information about the type of meter and the size and ratio of its CTS because someone noticed that there was no CT information about this location in the ComEd CIMS system. (ComEd Ex. 2.03). This inspection resulted in the discovery and correction of the error.

The 2010 inspection demonstrated that although a timely post installation inspection within 90 days (required by Section 410.155) did not occur, if it had, the CT information would have been processed and measuring error that caused the under billing would have been corrected. The bills sent to LAZ from December 2007 until 2010 were based solely upon electric meter data rather than the meter/CT data multiplied by 600 as required by the installed CTs. The meter/CT parameters were not integrated into the billing system until the April 6, 2010 on-site inspection. This information could be obtained only from the meter/CT location and was required to generate proper bills.

Meter/CT integration is required of each measuring unit. ComEd's assertion that it conducted all necessary tests and inspections ignores the evidence to the contrary and that the point of the inspections and tests is to produce an accurate bill.

4. Compliance with Part 410 Requires Meaningful Tests and Inspections

The point of metering electric usage is to provide a bill based upon accurate energy measurement. The fact that the meter component in a meter/transformer installation is not inherently defective is irrelevant if the assembled measuring unit (the meter/transformer combination) is not performing its function. The measuring unit's operating parameters must be communicated to the billing system. Like any modern multicomponent electrical system, it does not matter if the parts work individually if they do not communicate and work together to perform their designed function.

The April 2010 discovery of the error and the subsequent incorporation of the meter/CT information into the system confirms that this meter service unit was incompletely installed and that the required Section 410.155 inspection was not performed.

Section 410.200(h)(1) provides in relevant part that:

if an electric utility is providing metering service, in no case shall an adjustment to a customer's billing be made for under-registration if all testing and accuracy requirements of this Part have not been met.

In other words, the amount under billed due to this type of error cannot be recovered from the customer if all testing and accuracy requirements are not met. The Commission finds that the requirements of the regulations were not met in this instance. The Commission finds that ComEd is barred from collecting the amount that LAZ was under billed for the period June 3, 2008 to May 3, 2010. ComEd Ex. 4.0 at 4; ComEd Ex. 4.03 at CCLP 0000009-11; ComEd Ex. 4.04.

B. The Disconnection Notice

ComEd has provided evidence that the \$36,625.07 at issue in the Disconnection Notice related to delivery service provided by ComEd to LAZ in a later time frame (May 3, 2010 and September 1, 2010). ComEd Ex. 4.0 at 5; ComEd Ex. 4.05. According to ComEd, contrary to LAZ's claims, LAZ was billed for this delivery service between July 9, 2010 and September 1, 2010, and not for prior unbilled service. ComEd Ex. 4.0 at 5. Specifically, the Disconnection Notice concerned the four months of 2010 delivery service charges that total \$36,143.30; and five late fees that total \$1,196.83; minus a credit in the exact amount of those late fees, that results in total charges and a corresponding payment amount by LAZ of \$36,143.30. ComEd Ex. 4.0 at 6; ComEd Ex. 4.03 at CCLP 0000011-12; ComEd Ex. 4.06; ComEd Init. Br. at 23.

LAZ does not provide any evidence aside from the ALJ ruling on Request to Admit # 6 supporting the assertion that this charge is for pre May 2010 unbilled service. LAZ suggests that this sum should be assessed against ComEd as a discovery sanction because of its failure to comply with the requirements of Ill. Supreme Court Rule 216.

Although the ALJ sanctioned ComEd by deeming the LAZ Requests to Admit (including liability for the \$36,143.30) as admitted, the evidence clearly indicates that the amount was for services that occurred after the meter billing error had been corrected.

Although the sanctions for failing to make a timely denial of requests to admit pursuant to Supreme Court rule 216 can result in binding judicial admissions, case law supports the proposition that a "request to admit facts is designed to eliminate the need to prove facts which are not in dispute, and it is not appropriate for a party to prove [its] case by use of this procedure where ultimate facts are fairly disputed." People v. Strasbaugh, 194 Ill.App.3d 1012, 1017 (4th Dist. 1990).

Moreover, Illinois Supreme Rule 201(j) provides that:

Disclosure of any matter obtained by discovery is not conclusive, but may be contradicted by other evidence.

The record is devoid of evidence supporting the assertion that the amount at issue in Request to Admit #6 was due to charges accrued more than two years prior to the discovery of the under registering LAZ meter/transformer installation at 25 W. Washington Boulevard at issue here. On the contrary, there is ample evidence that in fact the charges were for delivery services occurring after May 3, 2010. As an administrative agency, the Commission's decision must be based on the evidence of record. The Commission therefore declines LAZ's argument that the payment of \$36,625.07 at issue from the disconnection notice is barred by the two year limitation of Section 280.100(a)(2)

C. Computation of the Bill Amount due to under Registration

LAZ claims that the unbilled delivery service charges at issue in this case are \$259,937.85 for service from June 3, 2008 through May 3, 2010. See Request to Admit # 6 of the facts deemed admitted by the February 13, 2014 ALJ ruling. This number was derived from \$225,484.52 in total delivery service charges for the two year period plus \$36,625.07 invoiced in a disconnection notice dated September 9, 2010. LAZ asserts, without evidence other than the ruling on the Request to Admit, that this \$36,625.07 is for additional unbilled service prior to May 2010. ComEd has presented un-contradicted evidence that the \$36,625.07 is for delivery services occurring between May 5, 2010 and September 1, 2010. That sum of money does not represent an attempt to recoup under billing for services prior to May 2010.

After May 3, 2010, ComEd rebilled LAZ \$225,484.52 for delivery services for the two year period from June 3, 2008 to May 3, 2010. ComEd Ex. 4.0 at 4; ComEd Ex. 4.03 at CCLP 0000009-11; ComEd Ex. 4.04. In that time frame, ComEd had billed LAZ – and LAZ had paid \$44,541.37 for delivery services. ComEd subsequently gave LAZ a credit for the amount it paid (\$44,541.37) from June 2008 through to May 3, 2010 for delivery service. ComEd then reduced the amount sought for under billing delivery services charges to \$180,943.15. ComEd Init. Br. at 22-23; ComEd Ex. 4.0 at 1-2, 4; ComEd Ex. 4.03 at CCLP 0000009-11; ComEd Ex. 4.04; ComEd Reply Br. at 19. The Commission finds that the amount of under billing barred by ComEd's failure to comply with Sections 410.155 and 410.200(h)(1) in this case is \$180,943.15.

VII. FINDINGS AND ORDERINGS PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) the Commission has jurisdiction over the parties and the subject matter herein;
- (2) the recitals of fact and conclusions of law reached in the prefatory portion of this Order are supported by the record, and are hereby adopted as findings of fact and conclusions of law;
- (3) Commonwealth Edison Company installed an electric meter with associated transformers or CTs at 25 West Washington Boulevard, Chicago Illinois on December 14, 2007. When that installation occurred, the correct meter/transformer information necessary for the ComEd billing system to generate correct bills was not input into the Commonwealth Edison Company CIMS billing system;
- (4) the failure to communicate the meter/CT information to the billing system resulted in under billing by Commonwealth Edison Company for delivery services from this location from the date of installation until shortly after a post installation inspection was conducted on April 6, 2010;
- (5) 83 Ill Adm. Code 410.155 requires that within 90 days of the installation of any meter with associated transformers, a post installation inspection shall be made under load to determine if the meter is accurately measuring customer energy consumption;
- (6) Commonwealth Edison Company failed to conduct a timely post installation inspection of the LAZ meter/transformer service required by 83 Ill Adm. Code 410.155 within 90 days of its installation on December 14, 2007 or at any other time prior to April 6, 2010;
- (7) pursuant to 83 Ill. Adm. Code 410.200(h)(1), ComEd is barred from billing LAZ for the amount underpaid from June 3, 2008 and September 2010 because it failed to meet the testing and accuracy requirements;
- (8) after appropriate credits for the amount paid by LAZ during the period from June 3, 2008 through May 3, 2010, the amount that ComEd is barred from collecting from LAZ for delivery service bill at this location is \$180,943.15; that amount plus appropriate interest should be credited to the account of LAZ;
- (9) LAZ's claim for an additional \$36,625.07 is denied; the bill supporting that charge was properly issued for delivery services between June 3, 2010 and September 20, 2010; and
- (10) any objections, petitions and motions which remain undisposed of should be considered disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS ORDERED that LAZ's complaint is sustained in part and denied in part as indicated in the foregoing paragraphs.

IT IS FURTHER ORDERED that any objections, petitions and motions which remain undisposed of should be considered disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:
BRIEFS ON EXCEPTIONS DUE:
REPLY BRIEFS TO EXCEPTIONS DUE:

August 11, 2016
August 25, 2016
September 1, 2016

Terrance Hilliard
Administrative Law Judge